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## Civil Procedure

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## CIVIL PROCEDURE

M. MINNETTE MASSEY\* AND JOSEPH P. KLOCK, JR.\*\*

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In 1968 the Florida Rules of Civil Procedure underwent substantial revisions.<sup>1</sup> Since that time, the Florida appellate courts have decided several hundred cases interpreting the new rules, and the legislature has enacted several statutory provisions dealing with civil procedure.<sup>2</sup> In addition, this survey is being published simultaneously with the promulgation of major changes in the discovery and pleading provisions of the rules.<sup>3</sup>

## I. COURTS, JUDGES, AND ATTORNEYS

### A. *Jurisdiction of the Courts*

"Jurisdiction is the oxygen of an action. If present, the action is alive and the court may act."<sup>4</sup> Once a court acquires jurisdiction, it is retained until the termination of the action as long as the court does not exceed the limits of its authority.

A court's jurisdiction is continuing and remains vested even if a party leaves the geographical limits of the court's authority.<sup>5</sup> In *Keena v. Keena*,<sup>6</sup> the court had before it an appeal from a divorce and custody action. The appellant husband had filed for divorce in a Florida circuit court while his wife was residing in Germany. The wife returned to Florida to answer the complaint and to file a counterclaim. While the action was pending, however, the wife returned to Germany and took the children without her husband's consent or knowledge. The court ordered the wife to return to Florida; she refused. Subsequently, an order was entered granting the divorce and holding the wife in contempt of court. The trial court also ruled that the matter of custody would have to be held in abeyance be-

1. *In re* Florida Rules of Civil Procedure, 211 So.2d 206 (Fla. 1968).

2. This survey covers cases reported in volumes 222 through 247 of the Southern Reporter, Second Series, and laws enacted by the 1970 and 1971 Regular and Special Sessions of the Florida Legislature.

3. *See In re* The Florida Bar: Rules of Civil Procedure, 265 So.2d 21 (Fla. 1972).

4. *Keena v. Keena*, 245 So.2d 665, 666 (Fla. 1st Dist. 1971).

5. *Id.* Where there is concurrent jurisdiction between two courts, the first court which exercises jurisdiction acquires control to the exclusion of the others. Thus, where one court had exercised jurisdiction in a custody matter, the entry of an order modifying that decree at a later date by another court was improper. *Haley v. Edwards*, 233 So.2d 647 (Fla. 4th Dist. 1970).

6. 245 So.2d 665 (Fla. 1st Dist. 1971).

cause the court did not have jurisdiction to award custody until the children were returned to Florida. The District Court of Appeal, First District, reversed this order and held that once the court's jurisdiction attached, it continued despite the removal of the children from the country.

Two other cases presented situations where the trial court improperly limited the exercise of its jurisdiction. In *Forbes v. National Industrial Bank*,<sup>7</sup> a bank brought an unlawful detainer action under Florida Statutes section 82.04 (1969) in the civil court of record. The defendant denied all of the allegations of the complaint and filed a compulsory counterclaim seeking specific performance. On plaintiff's motion to dismiss for lack of the court's jurisdiction to hear the action, the counterclaim was dismissed. This was held to be reversible error. "When the lower Court was made aware of the counterclaim exceeding its jurisdiction, it was required to transfer the action to the Court in the same county having jurisdiction of the demand in the Counterclaim."<sup>8</sup> In the second case,<sup>9</sup> a two-count complaint was filed in the circuit court, but only one of the two counts alleged the requisite jurisdictional amount. The judge, on motion, transferred the smaller claim to the civil court of record. The District Court of Appeal, Third District, reversed and held that a complaint which satisfied the jurisdictional limits of the circuit court on at least one count vested the circuit court with jurisdiction of the entire action and that the action should not have been split.

Often, however, the real problem is caused by overreaching of jurisdictional limits, rather than by a hesitancy to exercise jurisdiction. Generally, the problem arises in connection with proceedings in courts with less than general jurisdiction.<sup>10</sup> The county judge's court, for instance, is a court of limited jurisdiction and its jurisdiction will not be presumed. "Its jurisdiction should appear by its records, and when its records and proceedings do not disclose jurisdiction in a particular case, (it) may be attacked . . . ."<sup>11</sup> Thus, where the record of a case did not show that the notice of an incompetency hearing was served timely, the county judge improperly denied an evidentiary hearing which was sought to determine whether notice had been sufficient. Similarly, in the absence of a specific rule or statute, a county judge's court is incapable of reopening a final judgment which it has entered regardless of custom and practice to the contrary.<sup>12</sup> Additionally, that court does not always have jurisdiction to

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7. 243 So.2d 613 (Fla. 4th Dist. 1971).

8. *Id.* at 615. The transfer should have been made to the circuit court pursuant to FLA. R. Civ. P. 1.170(j). This rule has been amended. See note 158 *infra*.

9. *Edgar v. Economic Opportunity Legal Services Program, Inc.*, 230 So.2d 487 (Fla. 3d Dist. 1970).

10. See, e.g., *Thomas v. Greene*, 226 So.2d 143 (Fla. 3d Dist. 1969), *cert. denied*, 234 So.2d 117 (Fla. 1969) (order exceeding jurisdiction of court held to be a nullity).

11. *In re White*, 230 So.2d 480, 482 (Fla. 1st Dist. 1970), quoting *Krivitsky v. Nye*, 155 Fla. 45, 54, 19 So.2d 563, 568 (1944). See also *In re White*, 237 So.2d 55 (Fla. 1st Dist. 1970).

12. *In re Estate of Armistead*, 240 So.2d 830 (Fla. 1st Dist. 1970). In that case, the county court had construed a will in a final order to include homestead and certain other

entertain a devastavit action;<sup>13</sup> nor does a justice of the peace court have the authority to refuse pleadings submitted for filing.<sup>14</sup>

When the court is acting within its jurisdictional scope, though, a great deal of discretion lies with a judge in the conduct of the proceedings. For instance, a judge is allowed to conduct a more informal trial in a non-jury action than in a jury proceeding.<sup>15</sup> In addition, a judge is given wide discretion in the manner of conducting any trial as long as he does not abuse his discretion.<sup>16</sup> Likewise, interlocutory orders or judgments made by a court during the progress of a case remain under the control of the court and may be modified or rescinded if necessary up until the time of final judgment.<sup>17</sup>

Removal, however, denies a court of its control and deprives it of its jurisdiction. Since the removal process wrenches jurisdiction away from a court, the procedural guidelines to accomplish removal are strictly construed and must be closely followed. In fact, the burden of proving compliance with each of the requisites lies squarely with the prospective transferor. In *Dade County Teachers' Association v. Rubin*,<sup>18</sup> the failure to give proper notice was held to bar a removal. There, the appellant association had engaged in a massive work stoppage on February 19, 1968, and the county authorities had filed for injunctive relief in the circuit court the following day. A hearing was set for February 22. On that day, an injunction was entered, but the association appealed on the grounds that the proceedings had been removed to the United States District Court hours before the injunction had been issued. The District Court of Appeal, Third District, affirmed the lower court's jurisdiction and held that the record had not demonstrated that notice had been given

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property in the "gross estate." The executor then filed a motion for rehearing which the court granted and entered a new order construing the will to exclude homestead from the "gross estate." The District Court of Appeal, First District, reversed.

In the absence of a rule promulgated by competent authority authorizing a petition for rehearing or motion for new trial subsequent to the entrance of a final order, a probate court loses jurisdiction as to that order save for those matters involving the inherent power and jurisdiction of the probate court . . . .

*Id.* at 831.

13. *See, e.g.*, *First Nat'l Bank v. Moon*, 234 So.2d 402 (Fla. 4th Dist. 1970).

14. *State ex rel. Kaufman v. Sutton*, 231 So.2d 874 (Fla. 3d Dist. 1970).

The acceptance of the filing of a complaint is a mere ministerial act, and the officer charged with the responsibility of receiving same is required to accept what is tendered to him if it is accompanied by the proper fee. . . . It is not incumbent upon one who has the ministerial function of accepting the filing of a complaint to judicially determine the legal significance of the tendered document.

*Id.* at 875.

15. *See Belcher Towing Co. v. Board of County Comm'rs*, 233 So.2d 456 (Fla. 3d Dist. 1970). There, it was held not to be prejudicial error for the judge to allow the written opinion of a federal district judge to be submitted for consideration by the court since the record clearly showed that the court later expressly rejected the proffer and ruled that it had no res judicata or estoppel by judgment effect.

16. *Potock v. Turek*, 227 So.2d 724 (Fla. 3d Dist. 1969), *cert. dismissed*, 238 So.2d 106 (Fla. 1970) (limiting time at closing argument held not to be an abuse of discretion).

17. *Holman v. Ford Motor Co.*, 239 So.2d 40 (Fla. 1st Dist. 1970).

18. 238 So.2d 284 (Fla. 1970), *cert. denied*, 400 U.S. 1009 (1971).

to the county authorities or that a copy of the federal court removal proceeding had been filed with the clerk of the circuit court, both specific requisites under the applicable federal statute.<sup>19</sup> The court concluded by pointing out that the appellants had failed to meet the burden of demonstrating that both of these requisites had been satisfied prior to the entry of the injunction, and thus, the circuit court retained jurisdiction.<sup>20</sup>

### B. Court Costs<sup>21</sup>

The amount and award of court costs after a final judgment often have a significant effect on the value of a successful verdict. The assessment of costs (even appellate costs) lies within the province of the trial court and is largely discretionary.<sup>22</sup> "The justice of the cause, in the light of all the circumstances involved, is the governing criterion."<sup>23</sup>

In *General Capital Corp. v. Tel Service Co.*,<sup>24</sup> the court held that the imposition of court costs need not necessarily follow the judgment. "Special circumstances might . . . dictate a contrary apportionment."<sup>25</sup> In that case, a lower court order which granted part of the appellate costs to the victorious appellant was upheld because the victory had been based solely on a legislative change effected while the case was on appeal.<sup>26</sup> The court indicated that the case was one of first impression in Florida, but cited as precedent two out-of-state cases where appellate costs had been taxed against successful appellants. In both of those cases, the result on appeal had been completely influenced by legislation enacted during the appellate process.<sup>27</sup>

Florida Statutes section 57.071 (1967) provides that if costs are awarded to any party in an action, court reporter expenses shall also be allowed.<sup>28</sup> The language of this statute appears mandatory, especially when compared with its predecessor, Florida Statutes section 58.13

19. 28 U.S.C. § 1446 (1970).

20. As it turned out, the federal district court remanded the case within a couple of days. In an interesting bit of dicta, the court quoted from *Hornung v. Master Tank and Welding Co.*, 151 F. Supp. 169, 172 (D.N.D. 1957) where a federal district court held:

There is a subsisting dual jurisdiction as to a removed case, and during the brief interlude between filing the Petition for Removal in federal court and the filing in state court of a copy of such Petition, both courts have active jurisdiction.

*Id.* at 286.

21. Fla. Laws 1970, ch. 70-134, has raised many of the fees charged by the courts. The allowance of attorneys' fees in judicial proceedings will be considered at section I, D, *infra*.

22. *General Capital Corp. v. Tel Service Co.*, 239 So.2d 134 (Fla. 2d Dist. 1970), *cert. denied*, 240 So.2d 815 (Fla. 1970). Costs are only allowable when provided by statute.

23. *Id.* at 136.

24. *Id.*

25. *Id.*

26. For a full discussion of the legislation in question, see Boyer & Goldberg, *Real Property, 1969-71 Survey of Florida Law*, 26 U. MIAMI L. REV. 96, 99-100 (1971).

27. *State Bd. v. Hays*, 190 Ky. 147, 227 S.W. 282 (1920); *National Carloading Corp. v. Phoenix-El Paso Express, Inc.*, 142 Tex. 141, 178 S.W.2d 133 (Ct. App. 1943).

28. "If costs are awarded to any party the following shall also be allowed . . . (2) [t]he expense of the court reporter for per diem, transcribing proceedings and depositions. . . ." FLA. STAT. § 57.071 (1967).

(1965) which bespoke "discretion." The District Court of Appeal, Fourth District, in a case dealing with the later statute, held that "the significance of costs being related to a useful and meaningful purpose is not altered . . ." <sup>29</sup> by section 57.071. Indeed, the court interpreted the purpose of the new section as providing costs only "in those instances where the court reporter has served a useful and necessary purpose . . ." in depositions or proceedings.<sup>30</sup> Accordingly, that court reversed a lower court's award of costs in the wake of a successful motion for partial summary judgment where the costs assessed against the appellant included payment for the depositions of two doctors who testified about damages where the summary judgment order did not reach that question, but only resolved the question of liability.

A less frugal District Court of Appeal, Second District, held in a short per curiam decision that a trial court in the proper exercise of its discretion could assess as costs the preparation time of an expert witness.<sup>31</sup> The court in so ruling looked to the language of Florida Statutes section 90.231(2) (1967) and found that nothing in that statute, which provides that expert witness fees may be levied as costs, could be construed as forbidding an assessment for an expert's preparation time.

### C. Judges

A judge generally has wide discretion in the administration of his judicial functions.<sup>32</sup> Indeed, the exercise of the discretion of a trial judge will not be questioned or altered on appeal unless a clear showing of abuse is demonstrated.<sup>33</sup>

Sometimes the question arises, though, as to the propriety of a judge hearing a certain case for one reason or another. In *State ex rel. Gerstein v. Stedman*,<sup>34</sup> a criminal case, the state attorney sought a writ of prohibition which sought the recusation of a criminal court of record judge on the grounds that the judge had openly criticized grand juries and questioned the reliability of the testimony of witnesses who had received immunity from prosecution. The case before the judge involved both a grand jury indictment and the testimony of an immunized witness. In denying the writ, the District Court of Appeal, Third District, held that a judge need not disqualify himself from hearing a case merely "because he has formed an opinion as to the legal questions involved in the case."<sup>35</sup> Absent a showing that a judge will refuse to follow the law in a certain case, the court indicated that recusation was not warranted

29. *Wilkins v. Superx [sic] Drugs*, 232 So.2d 19, 20 (Fla. 4th Dist. 1970).

30. *Id.*

31. *Conboy v. City of Naples*, 230 So.2d 476 (Fla. 2d Dist. 1970), *cert. denied*, 237 So.2d 537 (Fla. 1970).

32. See notes 22, 29 and 31 *supra* and accompanying text.

33. *Thrifty Super Market, Inc. v. Kitchener*, 227 So.2d 500 (Fla. 3d Dist. 1969).

34. 233 So.2d 142 (Fla. 3d Dist. 1970), *aff'd*, 238 So.2d 615 (Fla. 1970).

35. *Id.* at 144, *citing* *State ex rel. Sagonias v. Bird*, 67 So.2d 678 (Fla. 1953).

simply because a judge's personal views were contrary to certain principles of law.

Another question that frequently arises is the extent to which a successor judge may alter the rulings of a predecessor jurist. While a successor judge may not alter or modify final judgment ordered by his predecessor outside of the scope of review authorized by rule 1.540, he may indeed modify or change interlocutory orders previously entered according to a recent decision of the Supreme Court of Florida.<sup>36</sup> The court indicated, though, that "a judge should hesitate to undo his own work, and should hesitate still more to undo the work of another judge . . . ."<sup>37</sup> In addition, a successor judge is free to adopt previously determined questions of fact and render a judgment upon those findings.

#### D. Attorneys

Apart from cases dealing with disciplinary actions initiated by The Florida Bar, most of the cases dealing with attorneys during the survey period involved fees.

The allowance of attorney's fees as court costs<sup>38</sup> is strictly governed by statute unless provided for by contract. In two cases, one dealing with a mechanic's lien foreclosure<sup>39</sup> and the other involving a quiet title action,<sup>40</sup> attorney's fees were disallowed as costs since there was no statute authorizing such a grant. However, in *City of Hallandale v. Chatlos*,<sup>41</sup> the Supreme Court of Florida held that when the legislature enacted a statute allowing the levy of court costs in eminent domain proceedings,<sup>42</sup> it fully intended that reasonable attorney's fees would be includable in such costs.<sup>43</sup>

36. *Tingle v. Board of County Comm'rs*, 245 So.2d 76 (Fla. 1971).

There is a limitation, however, on a successor judge's reconsideration of his predecessor's final judgments and orders, (1) upon the merits on the same facts absent mistake or fraud (and now on the extended grounds in Civil Rule 1.540), and (2) upon discretionary final rulings where the facts remain unchanged. Such prior final rulings have been held by this Court not to be subject to reversal, modification or review by a successor judge, absent the grounds in Civil Rule 1.540. In the event, however, that subsequent events may defeat the prior judgment, the successor does have authority even after final judgment to make such further order as may be necessary to effectuate the judgment. Also, where the final order or judgment is not complete, the succeeding judge may supply the element which may have been omitted.

*Id.* at 77-78 (emphasis supplied by the court).

37. *Id.* "This 'code' of restraint is not based solely on the law of the case but is founded upon considerations of comity and courtesy." *Id.* (emphasis supplied by the court).

38. See section I, B, *supra*.

39. *Goldberg v. Banner Supply Co.*, 230 So.2d 714 (Fla. 3d Dist. 1970).

40. *Weisenberg v. Carlton*, 233 So.2d 659 (Fla. 2d Dist. 1970), *cert. denied*, 240 So.2d 643 (Fla. 1970).

41. 236 So.2d 761 (Fla. 1970).

42. Fla. Stat. § 73.091 (1969).

43. The case involved a voluntary dismissal, but since rule 1.420 provides for costs to be levied in favor of a non-dismissing party, the court held that attorneys fees could properly be assessed as costs pursuant to section 73.091. See also *Dawson v. Aetna Casualty & Surety Co.*, 233 So.2d 860 (Fla. 3d Dist. 1970), where attorney's fees were awarded pursuant to FLA. STAT. § 627.0127 (1967) upon dismissal of an insurer-filed declaratory action where the



Two conflicting cases have been decided by the district courts of appeal in Florida regarding the award of attorney's fees to successful insurance policy holders in actions brought against their insurers to enforce the terms of out-of-state insurance contracts. In *General Insurance Co. v. Roth*,<sup>44</sup> a plaintiff secured coverage from a carrier in Ohio to insure personal goods and furnishings which the plaintiff was transporting to his new domicile in Florida. During one of the trips, an accident occurred, and property damage was sustained. His Ohio-based agent instructed the insured to contact the company's Miami office, which he did. Subsequently, the insured filed suit to enforce his rights under the insurance contract and recovered a judgment. Part of the costs awarded him by the court were attorney's fees, and the defendant contested this award on appeal. The question presented to the appellate court was whether attorney's fees could properly be awarded to an insured based on the enforcement of an out-of-state insurance contract pursuant to Florida Statutes section 627.0127 (1967)<sup>45</sup> in light of the express language of Florida Statutes section 627.01001 (1967).<sup>46</sup> Citing a decision of the Supreme Court of Florida<sup>47</sup> which held that a statute similar to section 627.0127 was "plainly . . . procedural" and "applies to suits in Florida courts on insurance contracts made anywhere . . .,"<sup>48</sup> the District Court of Appeal, Third District, held that the attorney's fee award was proper despite the fact that the relied-upon case had been decided before the adoption of section 627.01001.

One year later, the District Court of Appeal, Fourth District, rejected the decision of the Third District and held that the award of attorney's fees was clearly improper when based upon an out-of-state insurance contract.<sup>49</sup> The court indicated that the language of section

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insured had filed a counterclaim: "The dismissal of the insurance company's action, therefore, in our opinion is the \* \* \* rendition of a judgment \* \* \* against an insurer in favor of an insured." *Id.* at 861, *tracking the language of* FLA. STAT. § 627.0127 (1967). *See also* notes 44 and 45 *infra* and accompanying text which recite the language of the statute and deal with other applications of this statute.

44. 233 So.2d 662 (Fla. 3d Dist. 1970) [hereinafter cited as *General Insurance*].

45. FLA. STAT. § 627.0127 (1967) [1969] provides:

(1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of an insured or the named beneficiary under a policy or contract executed by the insurer, the trial court, or in the event of an appeal in which the insured or beneficiary prevails, the appellate court, shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

(2) As to suits based on claims arising under life insurance policies or annuity contracts, no such attorney fee shall be allowed if such suit was commenced prior to expiration of sixty days after proof of the claim was duly filed with the insurer.

(3) Where so awarded, compensation or fees of the attorney shall be included in the judgment or decree rendered in the case.

46. FLA. STAT. § 627.01001 (1967) provides in part: "No provision of part II of this chapter [including FLA. STAT. § 627.0127 (1967)] shall apply to . . . (p)olicies or contracts not issued for delivery in this state nor delivered in this state . . ."

47. *Fellar v. Equitable Life Assur. Soc'y*, 57 So.2d 581 (Fla. 1952).

48. *Id.* at 583, *adopting the language of* *Fidelity-Phenix Fire Ins. Co. v. Cortez Cigar Co.*, 92 F.2d 882, 885 (5th Cir. 1937) (emphasis of court omitted).

49. *Pan-American Life Ins. Co. v. Fuentes*, 258 So.2d 8 (Fla. 4th Dist. 1971). According

627.01001 commanded their conclusion, and the court distinguished *General Insurance* on the grounds that it relied on a decision which predated the enactment of section 627.01001. Although the issue is ripe for conflict certiorari review, no petitions appear to have been filed to the Supreme Court of Florida. While certainly not dispositive of the conflict, the United States Court of Appeal, Fifth Circuit, has recently decided a case which adopts the position of the Fourth District.<sup>50</sup>

In the day-to-day operations of a law firm, problems arise in connection with fees for professional services. Generally speaking, attorneys are charged with a high degree of care in establishing the amount of their clients' fees. Consequently, it is improper for a lawyer to deduct monies from the proceeds of a real estate transaction for professional services rendered and then later bill his client for additional sums, especially when the client could properly believe that full payment had been made.<sup>51</sup> In addition, a lawyer cannot charge a fee for his professional services and at the same time appear as a material witness in his client's court action. Indeed, "[i]f from the very outset, the lawyer knows or can reasonably anticipate that his testimony will be essential to the prosecution of his client's case, he should decline the representation altogether . . . ,"<sup>52</sup> as should other members of the lawyer's firm.<sup>53</sup>

## II. JURISDICTION OVER THE PERSON<sup>54</sup>

### A. *In General*

Generally, before a court proceeds in an action, three requisites exist: jurisdiction over the subject matter,<sup>55</sup> venue,<sup>56</sup> and jurisdiction over the person. Of the three, the greatest amount of confusion is caused by

to the Clerk of the District Court of Appeal, Fourth District, this decision was mistakenly omitted from publication in the Southern Reporter, Second Series, for several months.

50. *Oliva v. Pan American Life Ins. Co.*, 448 F.2d 217 (5th Cir. 1971). So confident was the federal panel of the dispositive nature of section 627.01001 and the Fourth District opinion (*supra* note 49) on the matter before it that the court elected not to certify the question to the Supreme Court of Florida pursuant to FLA. STAT. §§ 25.031-.032 (1969).

51. *Jones v. Hearn*, 230 So.2d 50 (Fla. 1st Dist. 1970). In that case, the court held it improper for a lawyer to "hold his clients' valuable papers as ransom for an additional sum invoiced for the first time four months after closing . . . ," especially when no fee had been specifically established initially, and a payment of \$1,000.00 had been collected at settlement. *Id.* at 52.

52. *Hubbard v. Hubbard*, 233 So.2d 150, 152 (Fla. 4th Dist. 1970) (lawyer appeared as a material witness and co-counsel in a divorce proceeding).

53. *Id.* at 150 n.3. Subsequent to the period covered by this survey, the Supreme Court of Florida decided that in certain instances an attorney might well be permitted to collect a professional fee if it was necessary for him to withdraw from a case in order to appear as a material witness. However, the attorney must not have known prior to accepting the case that his testimony would be needed. *Hill v. Douglass*, No. 41,241 (Fla. filed March 1, 1972), *rev'g* 248 So.2d 182 (Fla. 1st Dist. 1971).

54. See Bayitch, *Conflicts of Law, 1970-1971 Survey of Florida Law*, 26 U. MIAMI L. REV. 1 (1971).

55. See sections I, A, *supra*.

56. See section III *infra*.

the last. However, jurisdiction over the person relates very simply to the power of the court to bring some "person" or "thing" within its control.

There are three types of actions in Florida: in personam, in rem, and quasi in rem. An in personam action is one in which the plaintiff "either seeks to subject the defendant's general assets to execution in order to satisfy a money judgment," or to secure a judgment "directing [a] defendant to do an act or refrain from doing an act under sanction of the court's contempt powers."<sup>57</sup> In rem actions "are those which seek not to impose personal liability, but rather to effect the interests of persons in a specific thing (or res)."<sup>58</sup> Jurisdiction is acquired in these actions by the court's exercise of control over the property. The third type of action is quasi in rem, which is a hybrid of the first two. Here, the court acquires jurisdiction

by attachment or garnishment or other seizure of property where the court has no jurisdiction over the person of the defendant but has jurisdiction over a thing belonging to the defendant or over a person who is indebted or under a duty to the defendant.<sup>59</sup>

Such jurisdiction, though, is normally limited to the value of the property attached or garnished in most United States jurisdictions.<sup>60</sup>

Regardless of the type of action filed or jurisdiction sought, it is clear that a defendant is entitled to notice of an action and a reasonable opportunity to defend the claim.<sup>61</sup> A defendant, in an in personam action, must either be served with process within the state<sup>62</sup> or have sufficient minimum contacts there to allow some alternate statutory method of service.<sup>63</sup> In quasi in rem and in rem actions, the thing to be seized, attached, or garnished must lie within the jurisdiction of the court.<sup>64</sup> Thus,

[t]he state has jurisdiction to entertain an action "in personam" over persons within its territory and to entertain an action "in

57. *T.J.K. v. N.B.*, 237 So.2d 592, 594 (Fla. 4th Dist. 1970). Included in this category are tort and contract actions.

58. *Id.* This category encompasses suits to quiet title, partition suits, lien foreclosure actions, and also divorce proceedings (the place of domicile being the situs of the res).

59. *Id.*

60. See RESTATEMENT OF JUDGMENTS § 40 (1942). Florida, however, appears to hold to the contrary at the present time. See *Newton v. Bryan*, 142 Fla. 14, 194 So. 282 (1940), a case decided before the current procedural rules were promulgated. In that case, the Supreme Court of Florida appeared to hold that a special appearance to contest jurisdiction over the person in in rem actions subjects a defendant to the general jurisdiction of the court. See *Robinson v. Loyola Foundation, Inc.*, 236 So.2d 154 (Fla. 4th Dist. 1970), (*infra* at section II, C) where a defendant who defended on the merits in a quasi in rem action was held to have submitted himself to the general jurisdiction of the court.

61. *Milliken v. Meyer*, 311 U.S. 457 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964); *State ex rel. Weber v. Register*, 67 So.2d 619 (Fla. 1953).

62. *Pennoyer v. Neff*, 95 U.S. 714 (1878).

63. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

64. See Section II, C, *infra*.

rem" with respect to things within its territory. It has jurisdiction by an action "quasi in rem" to enforce a personal claim against the defendant to the extent of applying the thing or property seized in satisfaction of the claim. The state through its courts has jurisdiction to exercise this power provided its procedure is reasonably calculated to give the persons effective notice of the action and a reasonable opportunity to contest the claim.<sup>65</sup>

While statutes which prescribe the methods of serving process are strictly construed,<sup>66</sup> there is a strong presumption regarding the validity of process when a return is filed by the sheriff.<sup>67</sup> Cases dealing with service by a sheriff generally make dull reading, but two decisions recently handed down by the District Court of Appeal, Fourth District,<sup>68</sup> are an exception to the rule.

The facts giving rise to both cases were the same and centered around two recalcitrant defendants. When one of the defendants observed a deputy sheriff emerging from his car, she fled up the sidewalk to her house with the deputy in hot pursuit. Though fleet afoot, the officer was met by a slammed door when he reached the house. Undaunted, he read the summons aloud on the doorstep and announced that he was leaving a copy of the summons and complaint for both husband and wife on the doorstep. The following day an employee of the husband found the papers and informed the defendants of their contents upon request. The circuit court, on motion, quashed service as to one defendant but refused to do so as regards the other. On interlocutory appeal, the Fourth District held that service was effective as to both defendants. The court stated that when an officer reasonably attempts to personally serve a party at home and that person reasonably should know the officer's purpose and identity, the service "cannot be frustrated by the simple expedient of . . . closing the front door in the officer's face and wilfully refusing to accept service of process . . . ."<sup>69</sup> When a summons is offered to someone, service cannot be avoided by "refusing physically to accept the summons." In fact, a person has an obligation to accept service of process when it is reasonably attempted.<sup>70</sup>

Unlike jurisdiction over the subject matter which can be attacked

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65. *T.J.K. v. N.B.*, 237 So.2d 592, 594 (Fla. 4th Dist. 1970).

66. *American Liberty Ins. Co. v. Maddox*, 238 So.2d 154 (Fla. 2d Dist. 1970).

67. *Winky's, Inc. v. Francis*, 229 So.2d 903 (Fla. 3d Dist. 1969). In that case, the uncorroborated testimony of a resident agent denying receipt of service of process was held insufficient to rebut the presumption of adequate service. However, in *Black v. Black*, 227 So.2d 53 (Fla. 1st Dist. 1969), the uncontradicted testimony of a party to a divorce action denying that she had ever lived at the place where service was made was held sufficient to rebut the presumption.

68. *Olin Corp. v. Haney*, 245 So.2d 669 (Fla. 4th Dist. 1971); *Haney v. Olin Corp.*, 245 So.2d 671 (Fla. 4th Dist. 1971).

69. *Haney v. Olin Corp.*, 245 So.2d 671, 673 (Fla. 4th Dist. 1971).

70. *Id.*, adopting the language of *Bergen County v. Kozuck*, 98 N.J. Super. 235, 236 A.2d 630 (1967), *aff'd*, 103 N.J. Super. 151, 246 A.2d 744 (App. Div. 1968).

at any stage of the proceedings, personal jurisdiction must be contested in a proper and timely fashion or any assault on its legality will be waived.<sup>71</sup> It is a defense and must be raised either by motion or, in the absence of a motion, in a responsive pleading.<sup>72</sup>

### B. *Substituted Service and the State's Long Arm Jurisdiction*

Substituted service of process is the device by which the state is able to acquire in personam jurisdiction over non-residents who have sufficient in-state contacts so as to warrant a court's exercise of jurisdiction.<sup>73</sup> Over the last two years, some of the cases dealing with substituted service have dealt with non-resident motorist mishaps,<sup>74</sup> but most long-arm cases have concerned the delineation of what constitutes "doing business" within the state so as to subject one to jurisdiction.<sup>75</sup>

There are several tests which the courts employ to determine whether a "person" is "doing business" within the state. It is clear, however, that there must be some contact with the state to justify the court's exercise of jurisdiction,<sup>76</sup> and some connection between a business activity and the subject matter of the suit. Consequently, non-resident stockholders and officers of a corporation cannot be served through the resident agent of their corporation in a personal action regardless of the degree of business activity of the corporation.<sup>77</sup> There is a strong burden which rests upon a party who attempts substituted service on a non-resident to show clearly that the use of long arm jurisdiction is justified, and the courts strictly construe any of the statutes granting such power.<sup>78</sup>

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71. See FLA. R. CIV. P. 1.140(h).

72. FLA. R. CIV. P. 1.140(b).

73. See FLA. STAT. §§ 48.151, 48.161, 48.171, 48.181, 48.19 (1969); FLA. STAT. § 48.182 (Supp. 1970).

74. In *Hoover v. Gates*, 229 So.2d 909 (Fla. 3d Dist. 1969), a non-resident automobile owner, who parked his vehicle in such a manner that a connected trailer protruded into the street, was held amenable to service of process under FLA. STAT. § 48.171 (1967) in a suit arising out of injuries to a minor who sustained personal injuries when his bicycle struck the trailer. In another case which touched upon the application of FLA. STAT. § 48.161 (1967), a suit involving an automobile accident, the court held that the use of substituted service of process depends on the location of the prospective defendant at the time of the filing of a suit. Thus, a non-resident of Florida was properly served under that statute even though he was a domiciled resident of Florida at the time of the events giving rise to the suit. *Penn v. Ashley*, 226 So.2d 351 (Fla. 1st Dist. 1969). See also FLA. STAT. § 48.182 (Supp. 1970); FLA. STAT. § 48.161 (1969), as amended by Fla. Laws 1971, ch. 71-308 (amendment allows service on statutory agent by certified mail in addition to other prescribed methods).

75. See FLA. STAT. §§ 48.071, 48.151, 48.181 (1969).

76. Where a plaintiff was unable to show any connection between the interests of two defendants within Florida and a promissory note entered into with one of the defendants in Massachusetts while he was still a resident of that state, the trial court acted properly when it quashed service brought in a Florida court based on the note. *Lipman v. Zuk*, 244 So.2d 496 (Fla. 3d Dist. 1970).

77. *Meiselman v. McKnight*, 226 So.2d 437 (Fla. 1st Dist. 1969).

78. *Lipman v. Zuk*, 244 So. 2d 496 (Fla. 3d Dist. 1970). Substituted service is so stringently applied that it cannot be used as a method of preserving the validity of service improperly attempted under another statute. See *Olin Corp. v. Haney*, 245 So.2d 669 (Fla. 4th Dist. 1971), where the court held that substituted service could not be relied upon to validate

To be "engaged in business" in Florida under the statutes, "[t]he determinative question is whether goods, property or services are dealt with within the state for the pecuniary benefit of the person providing or otherwise dealing with those goods, property or services."<sup>79</sup> The activities of the "person" sought to be subjected to the court's control "must be considered 'collectively' and show a general course of employment and conduct of carrying on business activity in the State for pecuniary benefit."<sup>80</sup> It has been held, for instance, that a non-resident who opened a bank account in the state, signed a contract to purchase a Florida restaurant business while in the state, applied for a liquor license, and signed an assignment of lease document in Florida was engaged in business there.<sup>81</sup> Similarly, a defendant who subleased, repaired, and hired a pilot for an aircraft in Florida was held to be doing business within the state.<sup>82</sup>

Regardless of the degree of business activity in the state, it is clear that the aim of serving process is not the forwarding of the papers, but rather the receipt of the service. In *Home Life Insurance Co. v. Regueira*,<sup>83</sup> a beneficiary of a life insurance policy brought suit against the insurance company, and service was attempted as provided by statute<sup>84</sup> on the state insurance commissioner. Instead of promptly dispatching the papers to the out-of-state company's office, the commissioner's staff inadvertently mailed the summons and complaint back to the plaintiff's attorney. The company later denied ever having received a copy of the process, and even though the commissioner's files contained a carbon copy of a letter of transmittal, the District Court of Appeal, Second District, held the service ineffective and quashed a lower court order which held the service valid, indicating that "the essential purpose of

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what was thought to be improper service under FLA. STAT. § 48.031 (1969). In that case, as it developed, the court found that service had been proper under that statute. See notes 68-70 *supra* and accompanying text.

79. *De Vaney v. Rumsch*, 228 So.2d 904, 906 (Fla. 1969), *rev'g* 218 So.2d 238 (Fla. 1st Dist. 1969).

80. *Id.* at 907, *adopting the language of Matthews v. Matthews*, 122 So.2d 571, 573 (Fla. 2d Dist. 1969). There is no distinction between professional and non-professional business activities. *Id.* at 906.

We hold the intent of the Legislature in enacting Florida Statute § 48.181, F.S.A., to be that any individual or corporation who has exercised the privilege of practicing a profession or otherwise dealing in goods, services or property, whether in a professional or nonprofessional capacity, within the State in anticipation of economic gain, be regarded as operating a business or business venture for the purpose of service under Florida Statute § 48.181, F.S.A., in suits resulting from their activity within the State.

*Id.* at 906-07. Although Mr. Justice Boyd referred to the service contemplated under FLA. STAT. § 48.181 (1967) as "constructive," the gravamen of the opinion centered around the application of "substituted" service (a common error of the bench and bar).

81. *Dans v. Gran Habana Restaurant & Lounge, Inc.*, 244 So.2d 157 (Fla. 3d Dist. 1971). See also *duPont v. Robin*, 237 So.2d 795 (Fla. 3d Dist. 1970).

82. *C.I., Inc. v. Travel Internationale, Ltd.*, 236 So.2d 441 (Fla. 1970), *aff'g* 228 So.2d 451 (Fla. 3d Dist. 1969).

83. 243 So.2d 460 (Fla. 2d Dist. 1970).

84. FLA. STAT. § 624.0222(1) (1969).

process is *notice*, \* \* \*, and there can be no notice in the legal sense without receipt of process."<sup>85</sup>

### C. Constructive Service

When the court has jurisdiction over property (real or personal, tangible or intangible) in an in rem or quasi in rem action, constructive service is employed to give notice to the effected party that the court has "seized" property pending the outcome of litigation involving the party. As with all other types of service of process statutes, constructive service provisions are strictly construed.<sup>86</sup> There is, however, a limitation on the types of actions which can be commenced with this type of service. Suits to quiet title, divorce actions, lien foreclosures, and personal property attachments are all amenable to constructive service; but for instance, where this type of service was purportedly employed to obtain in personam jurisdiction over a defendant in a bastardy proceeding, the judgment granted was held invalid.<sup>87</sup> Likewise, constructive

85. *Home Life Ins. Co. v. Requeira*, 243 So.2d 460, 462 (Fla. 2d Dist. 1970) (emphasis supplied by court). The court in this case specifically rejected the contention that actual service, rather than substituted service, was envisioned by FLA. STAT. § 462.0222(1) (1969). It was indicated, however, that the legislature had carefully prescribed that notice was to be given by registered or certified mail and implied that evidence of such statutory compliance might well have disposed the court to decide differently. *Id.* at 462-63.

86. *Gmaz v. King*, 238 So.2d 511 (Fla. 2d Dist. 1970). In that case, personal service in a quiet title action was not possible, and the plaintiff attempted constructive service. The court found that the plaintiffs had not utilized all of the available means to secure a proper address for the defendants to which notice of the action could be sent. Thus, a judgment predicated upon constructive service by publication (based upon an affidavit of plaintiff stating that defendant's address was unknown) was reversed. The court stated:

The principle involved herein is clearly outlined in *Klinger v. Milton Holding Co.*:

"When a complainant resorts to constructive service, he should make an honest and conscientious effort, *reasonably appropriate to the circumstances*, to acquire the information necessary to fully comply with the controlling statutes, to the end that the defendant, *if it be reasonably possible*, may be accorded notice of the suit." [Emphasis supplied]

and the full test of this principle is "\* \* \* whether the complainant *reasonably employed knowledge at his command*" in making the appropriate effort spoken of. (Italics supplied) Where personal service of process cannot be had, then service of process by publication may be had upon the filing of an affidavit on plaintiff's behalf stating the residence of the person to be served as particularly as is known after "diligent search and inquiry." In addition to the publication required as aforesaid, notice of the suit must be mailed to such address as "diligent search and inquiry" may cause to be discovered. We note, parenthetically, the strict compliance with these statutory procedures, at the peril of rendering the proceedings void, is rudimentary.

*Id.* at 514, quoting in part *Klinger v. Milton Holding Co.*, 136 Fla. 50, 67-68, 186 So. 526, 534 (1938); *McDaniel v. McElvy* 91 Fla. 770, 800, 108 So. 820, 821 (1926); FLA. STAT. §§ 48.02, 48.04, 48.13 (1965); FLA. STAT. §§ 49.021, 49.041, 49.12 (1969). See also authorities cited in *Gmaz v. King*, 238 So.2d 511, 514 n.8 (Fla. 2d Dist 1970).

87. *T.J.K. v. N.B.*, 237 So.2d 592 (Fla. 4th Dist. 1970).

Bastardy proceedings are purely statutory in nature, and the remedy given by the statute must measure the rights and liabilities of the parties. Certainly the theory that this type of action is an action "in rem," the child being the "rem," is untenable. It is impossible to sustain an argument that the action is one "in rem" as there is nothing to effect the interests of persons in a specific thing or res.

*Id.* at 595.

service was found to be ineffective to acquire personal jurisdiction for a negligence count in a multi-count complaint.<sup>88</sup>

In *Robinson v. Loyola Foundation, Inc.*,<sup>89</sup> the District Court of Appeal, First District, decided an interesting case involving several aspects of constructive service. In that case, a plaintiff-lessor sued a defendant-lessee on a lease affecting out-of-state property which had been negotiated and signed in another state. Neither party to the action was a resident of Florida. Since the defendants were not amenable to personal service of process within the state, constructive service of process predicted upon the attachment of real property owned by the defendants in Volusia County, Florida, was obtained. The defendants appeared and timely filed motions to abate the action for lack of jurisdiction over the person and to dismiss the action for insufficiency of service of process, which were denied by the trial court. The defendants then answered and defended on the merits, but were unsuccessful, and a personal judgment was entered against them. On appeal, the defendants claimed that constructive service of process by attachment was inapplicable on unliquidated damage claims under Florida Statutes section 76.04 (1969), that the attachment statute was unconstitutional since it provided for property to be attached on an ex parte basis without an opportunity for a hearing, and that the trial court improperly rendered a personal judgment when the judgment should have been limited to the extent of the real property attached. The First District disposed of the three objections and affirmed the trial court's decision.

In *Robinson*, the defendant had contended that the damages sought were unliquidated according to the holding of *Papadakos v. Spooner*.<sup>90</sup> In *Papadakos*, an attorney had filed suit against a former non-resident client and had sought the recovery of attorney's fees. Process was effected by attachment of real property. The District Court of Appeal, Third District, held that since the amount of attorney's fees had never been set, the claim was unliquidated and could not form the basis for attachment under section 76.04. Applying the reasoning of that case, the First District held that the damage claim was liquidated since the provisions of the lease clearly delineated the amounts due through simple calculation.<sup>91</sup> The court also approved the lower court's ruling that a demand for reasonable attorney's fees was proper and includable despite *Papadakos* because the defendant had not objected to the inclusion of this claim at the proper time.<sup>92</sup>

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88. See *Freedman v. Freedman*, 226 So.2d 455 (Fla. 3d Dist. 1969) (per curiam).

89. 236 So.2d 154 (Fla. 1st Dist. 1970).

90. 186 So.2d 786 (Fla. 3d Dist. 1966) [hereinafter cited as *Papadakos*].

91. "A claim for debt or damages is held to be liquidated in character if the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law." *Robinson v. Loyola Foundation, Inc.*, 236 So.2d 154, 157 (Fla. 1st Dist. 1970) and authorities cited therein.

92. The court . . . held that if the inclusion of the claim for attorney's fees in the complaint was improper in any respect because of its unliquidated character, such



As to the defendant's second point, the court rejected the attack on the constitutionality of section 76.04 on two grounds: first, that the matter had not been raised in the trial court; and second, that *Sniadach v. Family Finance Corp.*,<sup>93</sup> a case relied upon by the appellant, did not apply to the attachment provisions of section 76.04. In *Sniadach*, the Supreme Court of the United States struck down a Wisconsin garnishment statute which allowed the quasi in rem seizure of a wage earner's pay by his garnishee-employer without affording the defendant prior notice of the application for the writ of garnishment or an opportunity to be heard. The First District looked to language in *Sniadach* which indicated that the significance of the holding lay in the fact that wages were being garnished<sup>94</sup> and held that the *Sniadach* rationale did not apply to the attachment of property under section 76.04. The court concluded that "[t]he attachment amounts to little more than constructive notice that a suit for damages is pending against the owner and if judgment is rendered . . . , the attached property might be subjected to levy and sale to satisfy the judgment."<sup>95</sup> Thus, the statute was held to be constitutional.

The third point is the most intriguing. The defendants had staunchly maintained that regardless of the correctness or constitutionality of section 76.04, the recovery in the suit should have been limited to the value of the res seized and that the trial court's entry of a personal judgment had been improper and invalid. In overruling this objection, the court accepted the general principle as set forth by the defendant, but held that the defendant had nonetheless fallen victim to a procedural nicety which rendered the personal judgment valid. According to the court, when constructive service is effected by attachment, the non-resident defendant must first challenge such jurisdiction by motion or in his responsive pleading. If the trial court holds that it has jurisdiction, then the non-resident defendant must take an interlocutory appeal to contest jurisdiction. "In the event the jurisdiction issue was resolved against appellants on appeal, then any judgment rendered in the case . . . would necessarily have been one in rem to be satisfied, if at all, out of the

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inclusion would not affect the validity of the attachment based on liquidated claims properly included in the complaint but might be subject to being struck or disallowed on proper defensive motion filed by the defendants. No such motion was filed, however, so the defendants are considered to have waived their objection to the inclusion of this claim as part of the damages sought to be recovered. The reasoning of the trial court is sound and we approve its application to the facts and circumstances of this case.

*Id.* at 158.

93. 395 U.S. 337 (1969) [hereinafter cited as *Sniadach*].

94. *Robinson v. Loyola Foundation, Inc.*, 236 So.2d 154, 159 (Fla. 1st Dist. 1970), citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969): "We deal here with wages—a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process."

95. *Robinson v. Loyola Foundation, Inc.*, 236 So.2d 154, 159 (Fla. 1st Dist. 1970). "Such proceeding does not create the evils nor result in the hardships which often follow the garnishment of wages owed to a worker." *Id.*

property attached."<sup>96</sup> However, failure to follow this procedure submitted the defendants to the general jurisdiction of the court and made the entry of a personal judgment by the trial court proper. The court did point out, however, that the failure to take the interlocutory appeal would not waive the right to challenge the correctness of a court's jurisdictional rulings on appeal after final judgment, but as is evident by the results in this case, such an approach is fraught with peril.<sup>97</sup>

### III. VENUE

#### A. *In General*

The purpose of venue provisions "is to require that litigation be instituted in the forum which will cause the least amount of inconvenience and expense to those required to respond . . ." to an action.<sup>98</sup> It is a creature of statute and does not affect the jurisdiction of the court. In fact, it is a privilege which is waived unless a proper and timely challenge is made in the early stages of a lawsuit.<sup>99</sup>

A plaintiff is not required to plead facts in support of venue in his complaint; the burden of establishing the impropriety of venue lies squarely with the defendant, if he wishes to contest the place of trial.<sup>100</sup> As part of that burden, the defendant must demonstrate where proper venue lies.<sup>101</sup> An unsupported affidavit which simply states that venue has accrued in a different county, without more, is insufficient to meet the requisite burden. There must be specific averments negating the plaintiff's right to commence suit where it was initiated, and a demonstration made of where proper venue lies.<sup>102</sup> Where a suit was commenced in Brevard County for conversion and negligent handling of negotiable instruments, an officer of the defendant corporation filed an affidavit stating that it had no agent in that county at the time of the transaction and that all negotiations and dealings giving rise to the ac-

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96. *Id.* at 161.

97. The appellant took a direct appeal to the Supreme Court of Florida. *Robinson v. Loyola Foundation, Inc.*, appeal docketed, No. 39,636 (Fla. 1970). On July 27, 1971, on motion, the supreme court temporarily relinquished jurisdiction to the Volusia County circuit court for rule 1.540(b) proceedings. It will be very interesting when the case returns to the high court to observe the reception which the First District's third point (relating to the necessity of taking interlocutory appeals to protect against the entry of personal judgments) will receive. Although there appear to be no cases squarely on point, the authors submit that this opinion has not properly set forth the law of Florida relating to the submission of a defendant to the general jurisdiction of a court, where initial service is effected by constructive process in an in rem or quasi in rem action.

98. *James A. Knowles, Inc. v. Imperial Lumber Co.*, 238 So.2d 487, 488 (Fla. 2d Dist. 1970).

99. See generally FLA. STAT. ch. 47 (1969); FLA. R. CIV. P. 1.140(b), (g)-(h).

100. *Stolley & Assoc., Inc. v. Lawrence*, 243 So.2d 446 (Fla. 4th Dist. 1971); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Bank of Melbourne & Trust Co.*, 238 So.2d 665 (Fla. 4th Dist. 1970).

101. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Bank of Melbourne & Trust Co.*, 238 So.2d 665 (Fla. 4th Dist. 1970).

102. *Stolley & Assoc., Inc. v. Lawrence*, 243 So.2d 446 (Fla. 4th Dist. 1971).

tion had occurred in Orange County. The court remanded the cause to the trial court for further testimony on the question of where venue would be proper.<sup>103</sup>

Generally, venue is proper where the defendant resides, where the cause of action accrues, or where property in litigation is located.<sup>104</sup> Although few cases have been decided recently dealing primarily with defendant's place of residence venue,<sup>105</sup> there have been several decisions which turned on the determination of the accrual situs of a cause of action. In one suit, a libel action predicated upon statements published in a newsletter, venue was held to be proper in the county where the newsletter was circulated as well as in the county of publication.<sup>106</sup>

Contract actions raise some rather interesting venue questions. When a contractor sues his subcontractor for damages, venue is proper in the county where the work is to be performed, but when a subcontractor sues the contractor, venue lies where payment is to be made, regardless of where the work is to be done.<sup>107</sup> The fact that a contractor breaches or repudiates a contract with a subcontractor does not alter this rule.<sup>108</sup> Generally, in a contract action against a corporation, venue lies in the county where performance is called for by the contract (in addition, of course, to the county of corporate residence) and not where the benefits of the contract are to be enjoyed.<sup>109</sup> So, in an action upon a surety promise, venue was held proper in the county where the breach occurred, the place of the surety's business, and not in the county of the surety holder's business office where the benefits of the contract were to be enjoyed.<sup>110</sup> In another contract action, the District Court of Appeal, Second District, accepted the general rule that payment under a contract is to be made at the place of a creditor's residence, absent contractual provisions to the contrary, and that a breach of such a contract by the debtor will be held to have given rise to a cause of action in the county of the creditor's residence. The court added, though, that venue attaches in the county of the creditor's residence at the actual time of breach and that such venue will not be affected by a later transfer of

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103. *Merrill Lynch, Pierce, Fenner & Smith v. National Bank of Melbourne & Trust Co.*, 238 So.2d 665 (Fla. 4th Dist. 1970).

104. FLA. STAT. § 47.011 (1969).

105. *See Stolley & Assoc., Inc. v. Lawrence*, 243 So.2d 446 (Fla. 4th Dist. 1971); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Bank of Melbourne & Trust Co.*, 238 So.2d 665 (Fla. 4th Dist. 1970); *Maloney v. Fleishaker*, 238 So.2d 496 (Fla. 2d Dist. 1970).

106. *Steinhardt v. Palm Beach White House No. 3, Inc.*, 237 So.2d 590 (Fla. 3d Dist. 1970).

107. *B & F of Clearwater, Inc. v. Wesley Construction Co.*, 237 So.2d 790 (Fla. 2d Dist. 1970).

108. *Id.*

109. *See Henry v. Lemac Builders, Inc.*, 245 So.2d 115 (Fla. 3d Dist. 1971). There, the court held that venue in an action to recover unpaid rent was proper in the county where the rent was to be paid, not the county where the lease was executed.

110. *James A. Knowles, Inc. v. Imperial Lumber Co.*, 238 So.2d 487 (Fla. 2d Dist. 1970).

residence by the creditor to another county. In that case, *Hill v. Vetter*,<sup>111</sup> plaintiff-creditor sued defendant-debtor in the county where the plaintiff alleged that "demand" had been made for payment. The court rejected the creditor's contention that the time and place of "demand" controlled and held that venue was proper in Charlotte County where the debtor had repudiated (and thus breached) the contract two years previously. Venue was thus held to have been proper in Charlotte County.<sup>112</sup>

### B. *Transfer, Consolidation, and Severance*

As a general rule, "[w]hen any action is filed laying venue in the wrong county or district, the court may transfer the action . . ." to a court where proper venue exists.<sup>113</sup> Even if venue is proper, a court may transfer an action to another court, where the action could have been originally filed, for "the convenience of the parties or witnesses or in the interest of justice . . ."<sup>114</sup> Moreover, where allegations giving rise to several causes of action are contained in one complaint, suit may be brought in any county where any one of the actions could have been filed; but if expedient, the court may order separate trials.<sup>115</sup> However, when one cause of action is brought involving a number of defendants, a court may not divide the action and transfer some of the defendants to another court while retaining jurisdiction over others.<sup>116</sup>

Generally, where there are multiple defendants in an action, venue is proper in any county where any of the defendants reside or can be found.<sup>117</sup> However, in *Commercial Carrier Corp. v. Mercer*,<sup>118</sup> it was held that if all of the defendants can be found within one county, then, upon proper motion, the action must be tried in that county despite the provisions of Florida Statutes section 47.021 (1969). Also, if an individual defendant is joined as a party defendant with a foreign corporation, "and the corporate defendant has an agent in the county in which the individual defendant resides these statutory sections [Florida Statutes sections 47.021, 47.051 (1969)] cannot be applied to defeat the indi-

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111. 231 So.2d 286 (Fla. 2d Dist. 1970).

112. "[T]he critical point of time is *when* the contract was breached, or to put it another way it is *when* payment was due, and from thence we can determine *where* it was breached [and consequently, where venue was proper]." *Id.* at 287 (emphasis supplied by the court).

113. FLA. R. CIV. P. 1.060(b).

114. FLA. STAT. § 47.122 (1969).

115. *Steinhardt v. Palm Beach White House No. 3, Inc.*, 237 So.2d 590 (Fla. 3d Dist. 1970). See FLA. STAT. § 47.041 (1969).

116. *McCue v. Lane*, 228 So.2d 101 (Fla. 3d Dist. 1969). In its deliberations, the court considered the provisions of FLA. STAT. § 47.122 (1969), the "forum non-conveniens" statute, and held in remanding the case that the *entire* civil action might well be transferable to another county by the trial court if the requisites of that statute were met.

117. FLA. STAT. § 47.021 (1969).

118. 226 So.2d 270 (Fla. 2d Dist. 1969).

vidual defendant's venue privileges under Section 47.011 [the general venue statute]."<sup>119</sup>

A defendant may properly raise venue objections by a motion to dismiss, but the more appropriate and favored procedure is to file a motion to transfer the action to an appropriate court pursuant to rule 1.060(b).<sup>120</sup> In fact, the District Court of Appeal, Fourth District, ruled that if a defendant properly carries his burden of showing improper venue on a motion to dismiss, "the trial court should make an affirmative finding as to the proper venue and, unless there is a compelling reason to the contrary, *transfer* the cause to that venue . . . rather than dismiss it."<sup>121</sup>

The trial of insurer joinder cases<sup>122</sup> has raised special venue problems. In *Sage v. Travelers Indemnity Co.*,<sup>123</sup> the insurer, a foreign corporation authorized to do business in the state, was joined as a party defendant in an action brought against a motor vehicle operator for personal injuries arising out of a collision. Suit was filed in Orange County, Florida, where the insurer had an agent, and the insurer moved for and was granted a transfer to Lake County, Florida, the place of both the plaintiff's and individual defendant's residence and the situs of the collision.<sup>124</sup> The plaintiff appealed the change of venue, and the District Court of Appeal, Fourth District, reversed. The court held that in the absence of a showing that the individual defendant had asserted his venue privileges, a plaintiff could file and prosecute an action against both the individual and the out-of-state carrier in *any* county where the insurer had an agent pursuant to the Florida Statutes.<sup>125</sup> The court was concerned, though, that these insurer-joinder cases would encourage and allow plaintiffs "to shop for forums almost anywhere within the state without regard to convenience, expense

119. *Sage v. Travelers Indemnity Co.*, 239 So.2d 831, 833 (Fla. 3d Dist. 1970), *citing* *Enfinger v. Baxley*, 96 So.2d 538 (Fla. 1957). *See also* *Commercial Carrier Corp. v. Mercer*, 226 So.2d 270 (Fla. 2d Dist. 1969).

120. *Knowles v. Imperial Lumber Co.*, 238 So.2d 487 (Fla. 2d Dist. 1970).

121. *Merrill Lynch, Pierce, Fenner & Smith v. National Bank of Melbourne & Trust Co.*, 238 So.2d 665, 667 (Fla. 4th Dist. 1970) (emphasis added).

122. *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969); *Beta Eta House Corp. v. Gregory*, 237 So.2d 163 (Fla. 1970); *Stecher v. Pomeroy*, 253 So.2d 421 (Fla. 1971). *See* Section V, A, *infra*.

123. 239 So.2d 831 (Fla. 4th Dist. 1970).

124. *See* note 118 *supra* and accompanying text. When a foreign corporation and an individual Florida resident are sued in a state court, and the foreign corporation has an agent residing in the same county as the individual, upon proper motion by that individual, suit must be prosecuted in his county of residence.

125. FLA. STAT. § 47.011 (1969) is the general venue statute which provides that an action may be brought in any county where the defendant resides, the cause of action accrued, or property in litigation is located. FLA. STAT. § 47.021 (1969) provides that where two or more defendants residing in different counties are sued, venue is proper in any county where any defendant resides. FLA. STAT. § 47.051 (1969) provides, *inter alia*, that an action brought against a foreign corporation doing business in the state may be brought in any county where there can be found a corporate agent, where the cause of action accrued, or where the property in litigation is located.

and the justice of the matter."<sup>126</sup> However, the court indicated that the addition of the "Forum Non Convenience Statute,"<sup>127</sup> which was modeled after its federal counterpart,<sup>128</sup> "will serve as an effective tool in preventing forum shopping or venue abuse . . ."<sup>129</sup> The court consequently overturned the lower court order because the individual defendant had not asserted a venue preference for Lake County, where he resided, nor was there any showing on the record that the ruling had been made in conjunction with Florida Statutes section 47.122 (1969) or "based upon any criteria relevant and material to its application."<sup>130</sup> Thus, in a suit brought by an insured against an individual defendant and an out-of-state insurance carrier, venue is proper in any county where the insurer has an agent as long as the individual defendant does not properly object, and the forum non conveniens statute is not successfully invoked.

#### IV. THE INITIAL PHASES OF AN ACTION

##### A. *Setting Forth a Cause of Action*

###### 1. COMPLAINT

A complaint<sup>131</sup> must contain jurisdictional allegations, a statement of the ultimate facts giving rise to the action, and a demand for relief.<sup>132</sup> Generally, rule 1.110(b), which sets forth these requisites, tracks the language of its federal counterpart,<sup>133</sup> but there is one major distinction in Florida pleading rules, the requirement of setting forth *ultimate facts* rather than simply stating a claim.<sup>134</sup> The greater showing required by the state rules gives rise to a number of unique problems in Florida pleading.<sup>135</sup>

126. *Sage v. Travelers Indem. Co.*, 239 So.2d 831, 832 (Fla. 4th Dist. 1970).

127. FLA. STAT. § 47.122 (1969).

128. 28 U.S.C. § 1404(a) (1970).

129. *Sage v. Travelers Indem. Co.*, 239 So.2d 831, 833 (Fla. 4th Dist. 1970).

130. *Id.*

131. The allowable pleadings in Florida are: complaint or petition [FLA. R. CIV. P. 1.100(a)], answer [FLA. R. CIV. P. 1.100(a)], counterclaim [FLA. R. CIV. P. 1.170(a)-(b)], answer to counterclaim denominated as such [FLA. R. CIV. P. 1.100(a)], cross-claim [FLA. R. CIV. P. 1.170(g)], answer to cross-claim [FLA. R. CIV. P. 1.100(a)], third party complaint [FLA. R. CIV. P. 1.100(a), 1.180], answer to third party complaint [FLA. R. CIV. P. 1.100(a)], and reply (to an answer when ordered by the court) [FLA. R. CIV. P. 1.100(a)]. See M. MASSEY, CIVIL PROCEDURE FEDERAL AND FLORIDA 367 (Temp. Ed. 1972).

It should be noted that changes in the Florida Rules of Civil Procedure have been enacted by the Supreme Court of Florida at the time this survey is going to press (effective January 1, 1973). Some of those changes have expanded the pleadings allowable to include, *inter alia*, mandatory responses to affirmative defenses contained in responsive pleadings. This is, of course, contrary to the current practice. See FLA. R. CIV. P. 1.100(a), 1.110(d)-(e), 1.140(b). See also *In re The Florida Bar: Rules of Civil Procedure*, 265 So.2d 21, 23-24 (Fla. 1972) (as regards FLA. R. CIV. P. 1.100(a) and 1.140).

132. See FLA. R. CIV. P. 1.110(b). This rule applies not only to the original complaint, but also to counterclaims, cross-claims, and third party claims. See note 131 *supra*.

133. FED. R. CIV. P. 8(a).

134. FLA. R. CIV. P. 1.110(b) requires "a short and plain statement of the *ultimate facts* showing that the pleader is entitled to relief . . .," while FED. R. CIV. P. 8(a) demands only "a short and plain statement of the *claim* . . ." (emphasis added).

135. See cases reported in M. MASSEY, CIVIL PROCEDURE FEDERAL AND FLORIDA 404-18 (Temp. Ed. 1972).

A complaint which fails to set forth a short and plain statement of the ultimate facts may be dismissed,<sup>136</sup> but this general rule is not to be carried to extremes. For instance, "where a complaint contains sufficient allegations to acquaint the defendant with the plaintiff's charge of wrongdoing so that the defendant can intelligently answer the same, it is error to dismiss the action on the ground that more specific allegations are required."<sup>137</sup> The Supreme Court of Florida used this language in reversing a ruling of the District Court of Appeal, Third District, which affirmed the dismissal of a second amended complaint. The case had arisen over the payment of money due a hotel as a result of a political fund-raising banquet held at the establishment's place of business. The complaint alleged that the hotel's facilities had been "engaged" by the defendant, the dinner had been given, the defendant had agreed upon the price of the banquet before it was held and for payment out of the proceeds of the dinner, a certain fixed sum of money was due and payable, and the defendants had refused to tender payment. The defendants contended that the complaint did not state a cause of action because it failed "to specifically set forth the form of the agreement from which certain alleged obligations arose, as well as a detailed description of each element required to establish those obligations."<sup>138</sup> In rejecting that contention and reversing the Second District, the supreme court noted that the "primary intent" of the *ultimate facts* pleading requirement was "to eliminate technicalities and simplify the procedures involved in the administration of justice . . ."<sup>139</sup> and held that the facts set forth in the complaint, if true, were sufficient to conclude that some relief was warranted. In *Sorkin v. Rovin*,<sup>140</sup> however, a complaint alleging that the plaintiff had purchased apartments from the defendant and that the defendant had built a seawall and warranted its quality and construction was held not to have stated sufficient ultimate facts. The District Court of Appeal, Third District, observed that there had been "no allegations that Sorkin [the plaintiff] purchased the realty on which the apartments were located, or whether the purchase was by oral or written contract or by warranty, special or quit claim deed."<sup>141</sup> The court concluded that the complaint had properly been dismissed by the trial court.

Complaints based upon fraud<sup>142</sup> and conspiracy create special problems. "It has been held that general allegations of conspiracy are inadequate. The allegations must be clear, positive and specific."<sup>143</sup> In *Bond v.*

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136. *International Design, Inc. v. Rubin's Franchises, Inc.*, 247 So.2d 778 (Fla. 3d Dist. 1971).

137. *Fountainbleau Hotel Corp. v. Walters*, 246 So.2d 563, 565 (Fla. 1971), *rev'g* 231 So.2d 240 (Fla. 3d Dist. 1970).

138. *Id.* at 564.

139. *Id.* at 565.

140. 227 So.2d 492 (Fla. 3d Dist. 1969).

141. *Id.*

142. *See* FLA. R. Civ. P. 1.120(b).

143. *Bond v. Koscot Interplanetary, Inc.*, 246 So.2d 631, 635 (Fla. 4th Dist. 1971).

*Koscot Interplanetary, Inc.*,<sup>144</sup> a complaint framed in a conspiracy action was dismissed for failure to specifically set forth damages to the plaintiff. The court held that the failure to factually set forth the elements of a cause of action for conspiracy was a fatal flaw.<sup>145</sup> When an action sounding in fraud is alleged, the facts giving rise to the claim must be stated with a great deal of particularity. "In other words, the allegations should be specific and the facts constituting fraud clearly stated."<sup>146</sup>

While a party is generally "bound by the admissions and allegations contained in his pleadings and cannot take a position inconsistent with these admissions and allegations at the time of trial . . .,"<sup>147</sup> this rule cannot serve to limit the liberalized pleading provisions in Florida which allow a party to state as many claims or defenses as he wishes. These claims and defenses may be inconsistent and may demand legal or equitable relief. "The inconsistency permitted in pleadings may be in the statement of the facts or in the legal theories adopted."<sup>148</sup> The District Court of Appeal, First District, so held in *Ogden v. Groves*,<sup>149</sup> and adopted the following language:

"Such form of pleading permits the pleader maximum freedom in the development of his case, and permits his claim for relief or defense to be adjudicated on facts which are developed by discovery and evidence introduced at the trial rather than on the pleadings filed in the cause. The salutary purpose of the rule would be emasculated if not completely destroyed if the allegations of fact contained in an alternative and inconsistent statement of a cause of action or defense could be used in evidence against the pleader as proof of the facts alleged in such pleading."<sup>150</sup>

144. 246 So.2d 631 (Fla. 4th Dist. 1971).

145. The essentials of a complaint for civil conspiracy are (a) a conspiracy between two or more parties, (b) to do an unlawful act, or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) *damage to plaintiff* as a result of the acts done under the conspiracy. It is not to be presumed that a mere conspiracy per se has resulted in civil damages; therefore, that fact must be pleaded in the complaint in order to make a good cause of action against motion. (Emphasis added).

*Id.*, citing 4 FLA. LAW & PRAC. *Conspiracy* § 13, at 219 (1956).

146. *Nantell v. Lim-Wick Constr. Co.*, 228 So.2d 634, 637 (Fla. 4th Dist. 1970).

For fraud to be actionable, the following elements must be made to appear: (1) a misrepresentation of material fact; (2) [a] knowledge of the representor of the misrepresentation, or [b] representations made by the representor without knowledge as to either truth or falsity, or [c] representations made under circumstances in which the representor ought to have known, if he did not know, of the falsity thereof; (3) an intention that the representor induce another to act on it; and (4) resulting injury to the party acting in justifiable reliance on the representation.

*Id.* at 637. See FLA. R. CIV. P. 1.120(b).

147. *Ogden v. Groves*, 241 So.2d 756, 758 (Fla. 1st Dist. 1970).

148. *Id.* at 759. See FLA. R. CIV. P. 1.110(g). See section III, A, 2 *infra*.

149. 241 So.2d 756, 758 (Fla. 1st Dist. 1970).

150. *Id.* at 759, quoting *Hines v. Trager Constr. Co.*, 188 So.2d 826, 831 (Fla. 1st Dist. 1966).



## 2. COUNTERCLAIMS, CROSS-CLAIMS, AND THIRD PARTY CLAIMS

There are two varieties of counterclaims, compulsory and permissive. A compulsory counterclaim is one which arises "out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction."<sup>151</sup> A permissive counterclaim is one "against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."<sup>152</sup>

Both varieties of counterclaim may demand relief in excess of the amount of relief sought as well as defeat the recovery requested in the main claim;<sup>153</sup> may be presented as a supplemental pleading by leave of court if accrued after the commencement of the action;<sup>154</sup> may be permitted by the court when omitted through oversight, inadvertence, or excusable neglect;<sup>155</sup> and may involve additional parties which the court shall order brought into the action (as long as such parties can be brought in and the court will not lose jurisdiction by doing so).<sup>156</sup> However, the rules permitting counterclaims do not alter the law of sovereign immunity,<sup>157</sup> nor do they expand the jurisdiction of a court. If a counterclaim is filed which contains a demand for relief in excess of the jurisdictional authority of a court, the action will be transferred to an appropriate court.<sup>158</sup> In addition, a court does not lose jurisdiction of a counterclaim if the main claim is dismissed.<sup>159</sup>

A compulsory counterclaim must be brought during the proceedings of the principle action involving the same transaction or occurrence, or it will be waived. In *Lawyers Title Insurance Corp. v. Little River Bank & Trust Co.*,<sup>160</sup> the bank filed a cross-claim against the insurance

151. FLA. R. CIV. P. 1.170(a).

152. FLA. R. CIV. P. 1.170(b).

153. FLA. R. CIV. P. 1.170(c).

154. FLA. R. CIV. P. 1.170(e).

155. FLA. R. CIV. P. 1.170(f).

156. FLA. R. CIV. P. 1.170(h).

157. FLA. R. CIV. P. 1.170(d).

158. FLA. R. CIV. P. 1.170(j). See also *In re The Florida Bar: Rules of Civil Procedure*, 265 So.2d 21, 25 (Fla. 1972). Such a transfer will only be made if the filing fee for the transferee court accompanies the pleading which exceeds the court's jurisdiction. If the fee is not filed with the pleading, the claim will not be transferred, and recovery will be limited to the lower court's jurisdictional ceiling.

159. See FLA. R. CIV. P. 1.170(i).

160. 228 So.2d 412 (Fla. 3d Dist. 1969), cert. discharged, 238 So.2d 846 (Fla. 1970), petition quashed, 243 So.2d 417 (Fla. 1970). It is very interesting to note in this case that the Supreme Court of Florida filed an opinion in quashing the petition for certiorari. The opinion was filed, in the words of Justice Carlton, "to remind our fellow practitioners that jurisdiction in this Court is a matter strictly described by Article V, Section 4(2) of our Constitution . . ." *Id.*, 243 So.2d 417 (1970). The sole ground stated in the petition for certiorari was that the District Court of Appeal, Third District, had misconstrued or misapplied rule 1.170(a).

The supreme court either retained this written admonition for some particular reason or it was inadvertently omitted from publication since the discharging of certiorari on rehearing

company in an action where both were defendants. The insurance company filed a motion for summary judgment on the cross-claim which was granted and later filed a motion to file a third party claim against the bank which was granted. On appeal, the District Court of Appeal, Third District, reversed the lower court ruling allowing the third party complaint. Analogizing to the federal rules,<sup>161</sup> the court held that the failure to file the claim against the bank as a counterclaim before summary judgment was entered on the bank's cross-claim constituted a waiver of the claim since it was compulsory in nature: "By failing to file its compulsory counterclaim asserting such rights, it [the insurance company] has waived or is estopped to assert such rights, if any existed, and it may not later attempt to assert them in a third party complaint filed against the Bank."<sup>162</sup>

A permissive counterclaim has been held to be properly filed in an interpleader action by one of the defendants against the plaintiff-stakeholder.<sup>163</sup> It has also been held that regardless of the permissive or compulsory nature of a counterclaim, such a pleading may be inconsistent with denials in the defendant's answer. "A defendant may both deny the plaintiff's action and seek relief by counterclaim, and the assertion of a counterclaim does not operate as an admission of the plaintiff's claim."<sup>164</sup> Those pleadings were viewed merely as a "tentative outline of the position which the pleader takes before the case is fully developed on the facts through discovery and evidence introduced at the trial."<sup>165</sup>

Under rule 1.180, a defendant may implead any third person "not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." The purpose of the rule is to avoid a multiplicity of actions arising out of the same subject matter and facts.<sup>166</sup> However, in *Dick v. Dick*,<sup>167</sup> the court refused to allow the defendant husband to implead the plaintiff wife's father into a divorce action because the claim against the father was totally unrelated to the

(238 So.2d 846) was published before the quashing of the petition for certiorari (243 So.2d 417), even though the later reported quashing was handed down six months before the discharge of certiorari.

161. FED. R. CIV. P. 13(a).

162. *Lawyer's Title Ins. Corp. v. Little River Bank & Trust Co.*, 228 So.2d 412, 414 (Fla. 3d Dist. 1969). In so holding, the court looked in part to the federal courts and authorities. See 2A J. MOORE, FEDERAL PRACTICE ¶ 7.04, at 1539 (2d ed. 1968); 3 J. MOORE, FEDERAL PRACTICE ¶ 13.12, at 30 (2d ed. 1968). See also *Committee Note*, FLA. R. CIV. P. 1.170.

163. *Trak Microwave Corp. v. Medaris Man., Inc.*, 236 So.2d 189 (Fla. 4th Dist. 1970). See section VI *infra*.

164. *Ogden v. Groves*, 241 So.2d 756, 759 (Fla. 1st Dist. 1970). See notes 147-49 *supra* and accompanying text.

165. *Id.* In so holding, the court struck down a lower court's refusal to grant a dismissal motion on the grounds of an inconsistency between the denials in defendant's answer and the allegations in that same defendant's counterclaim.

166. *Mims Crane Service, Inc. v. Insley Mfg. Corp.*, 226 So.2d 836 (Fla. 2d Dist. 1969), *cert. denied*, 234 So.2d 122 (Fla. 1969).

167. 238 So.2d 469 (Fla. 3d Dist. 1970), *cert. denied*, 240 So.2d 641 (Fla. 1970).

divorce action. The court indicated that since the subject matter of that claim was unrelated to the principle action, it was an independent action and should not be joined in the divorce action.

There are limitations, though, to third party practice. Since the rules allowing impleading are governed by certain provisions of rule 1.170, a court may not assert jurisdiction over any third party defendant if by so doing, the court would oust its own jurisdiction over the action. Accordingly, in *Mandala v. Sarrow*,<sup>168</sup> the District Court of Appeal, Fourth District, reversed a summary judgment in favor of a third party defendant and ordered the entry of a dismissal order. Noting that such joinder had deprived the lower court of jurisdiction over the action, that the third party defendant was in no way liable to the defendant in the principle action, and that a reversal of summary judgment on the grounds of extant factual questions would simply result in another appeal asserting improper joinder, the court reversed the judgment and ordered the entry of dismissal on jurisdictional grounds.

### 3. AMENDING THE PLEADINGS

A party is permitted to amend a pleading once before a responsive pleading is served or within 20 days after service if no response is required. Any other amendments can only be made by leave of court or by written consent of the adverse party.<sup>169</sup> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."<sup>170</sup> Generally, a judge's determination as to whether leave to amend should or should not be granted "will not be disturbed in the absence of some demonstration that he has abused his discretion."<sup>171</sup> Amendments are, however, to be liberally allowed.<sup>172</sup>

The purpose of rule 1.190 is to further justice.<sup>173</sup> Thus, amendments are often permitted late in the proceedings. However, there are limitations. Mere mistake or inadvertence on the part of an attorney is not a sufficient excuse to warrant an exercise of a court's amendment powers,<sup>174</sup> nor must a court permit a plaintiff to amend his complaint

168. 234 So.2d 14 (Fla. 4th Dist. 1970) (per curiam).

169. FLA. R. CIV. P. 1.190(a).

170. FLA. R. CIV. P. 1.190(b). If a motion is made to conform the pleadings to the issues tried, it should be granted at any time. The failure to do so will not, however, affect the judgment on such issues. See *Cheek v. Long*, 235 So.2d 349 (Fla. 2d Dist. 1970).

171. *E & E Elec. Cont., Inc. v. Singer*, 236 So.2d 195, 197 (Fla. 3d Dist. 1970), cert. dismissed, 239 So.2d 827 (Fla. 1970).

172. *Sharpe v. Kelly*, 238 So.2d 315 (Fla. 4th Dist. 1970), cert. denied, 240 So.2d 645 (Fla. 1970); *Maiden v. Carter*, 234 So.2d 168 (Fla. 1st Dist. 1970); *Worth Ins. Co. v. Gammons*, 228 So.2d 127 (Fla. 1st Dist. 1969).

173. See FLA. R. CIV. P. 1.190(e).

174. *E & E Elec. Cont., Inc. v. Singer*, 236 So.2d 195 (Fla. 3d Dist. 1970). In this case, two counts of a complaint were dismissed with prejudice, while a third count was dismissed with leave to amend within 20 days. On the fourteenth day after the entry of the order, the plaintiff filed notice of interlocutory appeal, and the court set a supersedeas bond. The plain-

when that pleading fails to show matters within the court's jurisdiction.<sup>175</sup> Where a defendant sought to allege an affirmative defense after the trial court had announced its ruling, the court was justified in refusing to entertain the defense.<sup>176</sup> Similarly, a court which receives a motion to amend pleadings in a grossly untimely fashion may also properly refuse to permit such additions.<sup>177</sup>

On the other hand, "[a] motion to amend a complaint following a final summary judgment is not necessarily untimely . . ." <sup>178</sup> The fact that a summary judgment may be in order should not preclude the court's allowance of amendments to the plaintiff's pleadings especially where it is apparent that a proper defense or cause of action might well exist if correctly pleaded.<sup>179</sup> Likewise, the granting of an ore tenus motion to amend a complaint at the end of all testimony at a trial is not improper as long as the amendment does not change "the cause of action."<sup>180</sup> The fact that the "legal theory" of the action is changed by an amendment is of no consequence.<sup>181</sup>

The addition of parties through pleading amendments is more strictly controlled. One reason for this is that amended pleadings relate back to the time of the initial filing<sup>182</sup> and thus have an effect on the running of the statute of limitations. The determination of whether an amendment changing parties relates back to the time the suit was brought "depends upon the nature of the matter asserted by the amendment, *i.e.*, whether the amendment states a new cause of action or merely recites in a different form the cause of action stated in the original pleading."<sup>183</sup>

An amendment to plaintiff's complaint changing the parties to the suit so long as it does not introduce a new cause of action or make a new demand or substantially change the cause of action but merely restates in a different form the cause of action

tiff never paid the bond or filed assignments of error, and the appeal was dismissed. Sixty-three days after the expiration of the initial 20 day period, the plaintiff filed an amended complaint together with an affidavit claiming "mistake and inadvertence" by the attorney. The court dismissed the complaint with prejudice, and that determination was affirmed on appeal.

175. *Williams & Reed, Inc. v. Chase*, 227 So.2d 75 (Fla. 4th Dist. 1969), *appeals dismissed without opinion*, 237 So.2d 175 (Fla. 1970).

176. *Cohen v. Landow*, 242 So.2d 801 (Fla. 3d Dist. 1971).

177. *McKnight v. Hialeah Race Course*, 235 So.2d 552 (Fla. 3d Dist. 1970) (per curiam) (leave to amend not requested for five month period between dismissal and issuance of final judgment); *Maiden v. Carter*, 234 So.2d 168 (Fla. 1st Dist. 1970) (two years, one amended complaint filed, and no further facts offered to court to justify second amendment).

178. *Sea Shore Motel Corp. v. Fireman's Fund Ins. Co.*, 233 So.2d 651, 652 (Fla. 4th Dist. 1970), *cert. denied*, 238 So.2d 425 (Fla. 1970).

179. *Id.* See also *Watier v. Rew Crane Service, Inc.*, 240 So.2d 177 (Fla. 4th Dist. 1970).

180. *Ferrer v. McMurry*, 238 So.2d 315 (Fla. 3d Dist. 1970); *Bernard Marko & Assoc., Inc. v. Steele*, 230 So.2d 42, 44 (Fla. 3d Dist. 1970) (dictum).

181. *Strickland v. St. Petersburg Auto Auction, Inc.*, 243 So.2d 603 (Fla. 4th Dist. 1971).

182. FLA. R. CIV. P. 1.190(c).

183. *Lindy's of Orlando, Inc. v. United Electric Co.*, 239 So.2d 69, 72 (Fla. 4th Dist. 1970), *cert. denied*, 242 So.2d 463 (Fla. 1970).

originally pleaded relates back to the commencement of the action so as to avoid the operation of the statute of limitations, and may therefore be made even after the statute of limitations has run. But where the amendment by the change of the parties introduces a new cause of action or one which is different and distinct from that originally set up, the new pleading is deemed equivalent to the bringing of a new action, and there is no relation back to the filing of the original pleading, which will prevent the statute of limitations from running against the new cause of action down to the time that it is introduced by the amendment.<sup>184</sup>

In *Lindy's of Orlando, Inc. v. United Electric Co.*,<sup>185</sup> the District Court of Appeal, Fourth District, reversed a lower court ruling which had granted a judgment on the pleadings on the grounds that the statute of limitations had run after the court permitted an amendment changing the name of the plaintiff from one corporation to another. Noting that both corporations were owned by the same man (one corporation owning the building, the other owning the business); that the defendant corporation was not being adversely affected; and that the "mere substitution of parties plaintiff . . . [did not constitute] a new cause of action . . .,"<sup>186</sup> the Fourth District reinstated the plaintiff's action and remanded.

In a personal injury action brought against Viele Groves, Inc.,<sup>187</sup> responsive pleadings as well as interrogatories and requests for admissions had been filed, and the defendant corporation had denied that it did business in the state or that it owned or had any interest in property where the injury occurred. By stipulation, the parties agreed to continue the proceedings to allow the plaintiff to amend her complaint which she did by naming Charles E. Viele and his wife as co-defendants. The defendant corporation through its president, Charles Viele, then moved for and was granted summary judgment on the grounds that the corporation was a shell and had never engaged in business in Florida. Subsequently, Viele and his wife moved for dismissal on the grounds that the four-year statute of limitations had run. That motion was also granted. On appeal, the District Court of Appeal, Fourth District, was faced with the question of whether an amendment to a complaint attempting to substitute the names of an individual for that of a corporation "relates back to the commencement of the action so as to defeat a defense based on the statute of limitations . . ." under the purview of rule 1.190(c)-(e).<sup>188</sup> The court saw the critical concern as whether the amendment sought to

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184. *Id.*

185. 239 So.2d 69, 72 (Fla. 4th Dist. 1970), quoting *Griffin v. Workman*, 73 So.2d 844, 847 (Fla. 1954).

186. *Id.* "The mere change of the name of the plaintiff in the title would not of course change the cause of action." *Id.*

187. *Galuppi v. Viele*, 232 So.2d 408 (Fla. 4th Dist. 1970), cert. denied, 238 So.2d 109 (Fla. 1970).

188. *Id.* at 409.

correct a misnomer or whether it was an attempt to make new parties to the suit.<sup>189</sup> Looking to federal cases which turned on "the relationship between the old and the new party,"<sup>190</sup> the Fourth District held that the amendment was proper as to Charles Viele because he had actively participated in the suit and had notice from the time of the commencement of the action as an officer of the defendant corporation. The court did not, however, impute this knowledge to Viele's wife, but remanded the case to the trial court for a factual determination to be made as to her knowledge of the action.

## B. Defenses

### 1. PLEADING DEFENSES GENERALLY

Defenses are generally set forth in a responsive pleading,<sup>191</sup> although certain defenses may be raised by motion.<sup>192</sup> Unless ordered by the court, no reply is needed to an affirmative defense raised in a responsive pleading.<sup>193</sup> Estoppel is one defense which must be affirmatively set forth in a pleading.<sup>194</sup> However, in a fashion similar to the rules affecting amended pleadings, if a defense is raised during the course of the proceedings, though not specifically pleaded, justice may demand its consideration. In *Criado v. Milgram*,<sup>195</sup> a mortgage foreclosure action, the defendant maintained that the plaintiff had notice of the fact that defendant had continued to make mortgage payments to plaintiff's assignor, and that the foreclosure action was fraudulent. The court granted a motion by defendant to assert the defense of estoppel. The defendant failed to amend the pleadings and at the termination of the trial was refused a jury instruction on estoppel. In reversing this determination on appeal, the District Court of Appeal, Third District, observed that the trial court's entry of the order allowing the estoppel defense "represents an initial recognition of the parties' right to defend their position under applicable

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189. In arriving at a determination of this issue we must of necessity consider subparagraphs (c) and (e) of Florida RCP 1.190, 30 F.S.A. We must determine if the proposed amendment corrects a misnomer or whether it brings in new party defendants. If the amendment is granted and its effect is merely to correct a misnomer, there is no doubt that the amendment would relate back in time to the date of the original complaint . . . . But if its effect is to make new parties to the suit, the amendment would not relate back and the statute of limitations would bar the action.

*Id.* at 410.

190. *Id.*

191. FLA. R. CIV. P. 1.110(d), 1.140(a)-(b).

192. See section IV, B, 3 *infra*.

193. FLA. R. CIV. P. 1.140(b). However, newly enacted rules promulgated by the Supreme Court of Florida require responses to such defenses in an additional pleading. See *In re The Florida Bar: Rules of Civil Procedure*, 265 So.2d 21, 23-24 (1972) (effective January 1, 1973).

194. *Coppedge Terminal Corp. v. Hill*, 241 So.2d 743 (Fla. 1st Dist. 1970); *Rod-Lyn Corp. v. De Belay*, 231 So.2d 233 (Fla. 3d Dist. 1970), *cert. denied*, 237 So.2d 754 (Fla. 1970).

195. 237 So.2d 596 (Fla. 3d Dist. 1970), *cert. denied*, 240 So.2d 813 (Fla. 1970).

law . . . . Their failure to later embody the court's ruling should not . . . be held to bar them from asserting this meritorious defense."<sup>196</sup>

## 2. LIMITATIONS

Of the 19 enumerated affirmative defenses listed in rule 1.110(b), the most frequently litigated one during the survey period was the statute of limitations. The specific periods of time which activate the statute are for the most part set down in Florida Statutes chapter 95 (1969). It is clear in Florida, though, that the limitations statute does not begin to run until an aggrieved party knows or by exercise of reasonable diligence should have known of a cause of action, in the absence of fraud or fraudulent concealment. The question of when a party knew or should have known of a certain occurrence is a question of fact.<sup>197</sup> So, in an action brought by a mother against her sons for fraudulent conversion of her savings account, the granting of a summary judgment based on the running of the statute was found improper in the absence of a determination by the fact finder as to the date the cause of action properly accrued.<sup>198</sup> In a similar vein, a claim based on indemnification cannot be said to have accrued until such time as liability has been assessed against the owner of the product.<sup>199</sup>

Even though some jurisdictions hold that the cause of action in a malpractice action against a lawyer accrues at the time of the attorney's negligence, the District Court of Appeal, First District, squarely rejected this contention. In a case of first impression,<sup>200</sup> the court held that a legal malpractice action accrues for purposes of the statute of limitations on the date when the lawyer's negligence first becomes known to the client. And, lest it be thought that the insurance lobby has been inactive, attention should be directed to a recent amendment of Florida Statutes chapter 95 (1969) which shortens the time for filing a medical-related malpractice action from four to two years as of July 1, 1972.<sup>201</sup>

In a decision affirming the dismissal of a personal injury action brought for the benefit of a four-year-old girl who had been orphaned and injured in a March 1964 automobile crash,<sup>202</sup> the District Court of

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196. *Id.* at 598.

197. *Hart v. Hart*, 234 So.2d 393 (Fla. 1st Dist. 1970).

198. *Id.*

199. *Mims Crane Service, Inc. v. Insley Mfg. Corp.*, 226 So.2d 836 (Fla. 2d Dist. 1969), *cert. denied*, 234 So.2d 122 (Fla. 1969). For purposes of tolling the statute, the court will look to the substance of the allegations to see if they make out a cause of action for a specific legal remedy. The fact that the complaint does not clearly state its cause of action will not control. In this case, the court found that the elements of an indemnification action had been alleged, and thus the statute would toll for an indemnification action and save the suit from dismissal. (It should also be noted that the court looked both to the complaint and an attached exhibit to find the needed elements.)

200. *Downing v. Vaine*, 228 So.2d 622 (Fla. 1st Dist. 1969), *appeal dismissed*, 237 So.2d 767 (Fla. 1970).

201. Fla. Laws 1971, ch. 71-254, *amending* FLA. STAT. § 95.11(6) (1969).

202. *Gasparro v. Horner*, 245 So.2d 901 (Fla. 4th Dist. 1971).

Appeal, Fourth District, held that the four-year limitations provisions began to run on the date the accident occurred despite the fact that the child had not been adopted until 21 months after the accident which took her natural parents' lives. In a stinging dissent, Judge Walden attacked the position taken by the majority and stated:

[I]t is manifestly unfair to penalize an innocent child for the inaction of others, especially when there is no showing that those persons exist or were in any way under any duty, requirement, authorization, or direction to act . . . . In sum, the Statute of Limitations should be tolled as concerns the tort claim of an infant where and while such infant has neither parent, guardian, next friend, or other legal representative in existence capable of bringing suit for and on behalf of such minor.<sup>203</sup>

Noting a distinction between salaries and wages,<sup>204</sup> the Supreme Court of Florida held in *Broward Builders Exchange, Inc. v. Goehring*,<sup>205</sup> that the statute of limitations for an action for recovery of salary withheld was not governed by the one year provision of Florida Statutes section 95.11(7)(b) (1969), but that actions involving wages were. In an opinion which examined legislative intent so closely that the grammar and punctuation of a provision were analyzed, the court rejected a statutory construction which excluded wage claims accruing under a contract<sup>206</sup> and observed that "it is difficult to conceive of a claim for wages which does not in some manner arise from a contract expressed or implied."<sup>207</sup> While conceding that a federal statute of limitations has preempted the field in cases arising under specific federal law, the court held that section 95.11(7)(b) still remained in full force and effect as to cases arising out of Florida legislation and common law. Thus, that section "was intended to apply to all suits for wages or overtime, however accruing, as well as to suits for damages and penalties accruing under the laws respecting the payment of wages and overtime."<sup>208</sup> In another case

203. *Id.* at 903. It is significant that Judge Walden's dissent was addressed to a per curiam affirmance without an opinion. Subsequently, the majority wrote an opinion on rehearing which was effectively a rebuttal to Judge Walden's opinion, which the judge was quick to observe in his second dissent to the later opinion. The court did, however, certify the question to the Supreme Court of Florida as a matter of great public interest. *Id.* at 906-07.

204. "Courts usually restrict the term 'wages' to sums paid as hire to domestic or menial servants and those employed in the various manual occupations. On the other hand, the term 'salary' usually has reference to the compensation of clerks, salesmen, bookkeepers, other employees of like class and performing like services and supervisory personnel and officers of corporations, as well as public officers." . . . "The word 'salary' imports a specific contract for a specific sum for a specified period of time, while 'wages' are compensation for services by the day or week."

*Broward Builders Exchange, Inc. v. Goehring*, 231 So.2d 513, 514 (Fla. 1970), *rev'g in part* 222 So.2d 801 (Fla. 4th Dist. 1969), and authorities relied upon therein.

205. 231 So.2d 513 (Fla. 1970).

206. *Goehring v. Broward Builders Exchange, Inc.*, 222 So.2d 801 (Fla. 4th Dist. 1969).

207. *Broward Builders Exchange, Inc. v. Goehring*, 231 So.2d 513, 514 (Fla. 1970), *rev'g in part* 222 So.2d 801 (Fla. 4th Dist. 1969).

208. *Id.* at 515.



dealing with federal preemption,<sup>209</sup> the District Court of Appeal, Third District, held that even though contractual provisions shortening statutory limitation periods are against public policy and are void,<sup>210</sup> contracts controlled by federal maritime law which permit such alterations of the limitations period can have such provisions if specifically authorized by statute.<sup>211</sup>

The defense of the statute of limitations may be raised in an answer or by motion,<sup>212</sup> but to have an action dismissed, it must affirmatively appear on the face of the complaint that the statute has run.<sup>213</sup> In *Williams v. Covell*,<sup>214</sup> an action had been filed in 1963, but the summons had not been issued and served until 1969. The defendant moved for, but was refused an order of dismissal on the grounds that the statute of limitations had run. On appeal, this ruling was upheld because, according to the court, "[a] reading of the complaint clearly shows that the same was filed within three years after the alleged accrual of the cause of action . . . ."<sup>215</sup>

### 3. MOTION PRACTICE

At the option of the pleader several defenses can be raised by timely motion if filed before a responsive pleading, when one is due.<sup>216</sup> All of these defenses must be raised at one time or be waived with two exceptions. An attack on jurisdiction over the subject matter may be raised at any time, and the defenses of failure to state a legal defense, join an indispensable party, and state a cause of action may be made by a later pleading, if allowed, by a motion for a judgment on the

209. *Coquette Originals, Inc. v. Canadian Gulf Line of Florida, Inc.*, 240 So.2d 847 (Fla. 3d Dist. 1970).

210. FLA. STAT. § 95.03 (1969).

211. *See, e.g.*, 46 U.S.C. § 1300-15 (1970).

212. *Williams v. Covell*, 236 So.2d 447 (Fla. 1st Dist. 1970).

213. *Id.* *See also* *Lindy's of Orlando, Inc. v. United Elec. Co.*, 239 So.2d 69 (Fla. 4th Dist. 1970), *cert. denied*, 242 So.2d 463 (Fla. 1970).

214. 236 So.2d 447 (Fla. 1st Dist. 1970).

215. *Id.* at 448. While the result in this case seems somewhat ludicrous and is not improved any by the court's reticence to solve the riddle at the conclusion of their opinion, there would appear to be several options open to the defendant. If the defendant had known of the filing of the complaint, he should have filed a motion to dismiss for failure to prosecute under FLA. R. Civ. P. 1.420(e) after one year had elapsed. In fact, since there are no cases holding that the return of process constitutes "action" under that rule, it might well be that such a motion could still be filed by the defendant. In the event that either or both of these methods fail, the defendant could file an answer setting up the defense of the running of the statute of limitations, file an accompanying affidavit from the county sheriff indicating that service had not been attempted for the six year period, and move for summary judgment. While the running of the statute must appear on the face of the pleadings to succeed in a motion to dismiss or a motion for judgment on the pleadings, this requirement is not effective when a motion for summary judgment is sought.

216. FLA. R. CIV. P. 1.140(b). Those defenses are: lack of jurisdiction over the subject matter (*See* Section I, A *supra*); lack of jurisdiction over the person (*See* Section II *supra*); improper venue (*See* Section III *supra*); insufficiency of service of process (*See* Section II *supra*); failure to state a cause of action (*See* Section IV *supra* and *infra*); and failure to join an indispensable party. *Id.*

pleadings, or at trial on the merits.<sup>217</sup> In addition, in the pretrial stages, motions to strike all or part of the pleadings<sup>218</sup> and for a more definite statement<sup>219</sup> may also be made.

The purpose of a motion to dismiss for failure to state a cause of action is "to ascertain if the plaintiff has alleged a good cause of action . . . ."<sup>220</sup> In disposing of such a motion, the court must confine itself to the allegations and facts contained within the four corners of the complaint,<sup>221</sup> and all of the allegations and facts contained in the pleadings of the non-moving party must be taken as true for purposes of the motion.<sup>222</sup> The defendant is deemed for those purposes to have admitted not only the truth of the plaintiff's allegations and facts, but also all reasonable inferences that would arise from such facts.<sup>223</sup> "It is not the court's duty to speculate as to what the true facts may be or what facts may ultimately be proved at the trial of the cause."<sup>224</sup> Thus, the question of evidentiary sufficiency is wholly irrelevant and immaterial in considering the motion.<sup>225</sup> So, allegations in a workmen's compensation action complaint which alleged that architects had been negligent in failing to provide a sufficient guardrail around a 12 foot high jobsite were found sufficient to withstand a motion to dismiss.<sup>226</sup>

The determination of the sufficiency of a complaint is clearly a question of law, and the allegations in a complaint taken as true are to be measured against the applicable legal standards.<sup>227</sup> If a complaint sets

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217. FLA. R. CIV. P. 1.140(g)-(h). See *Schmauss v. Snoll*, 245 So.2d 112 (Fla. 3d Dist. 1971), *cert. denied*, 248 So.2d 172 (Fla. 1971), and *Kirk v. Kennedy*, 231 So.2d 246 (Fla. 2d Dist. 1970) (sovereign immunity is not a defense, but rather goes to the question of a court's jurisdiction; it can be raised at any time); *Wilds v. Permenter*, 228 So.2d 408 (Fla. 4th Dist. 1969) (jurisdictional objections cannot be waived and may be raised at any time).

218. FLA. R. CIV. P. 1.140(f).

219. FLA. R. CIV. P. 1.140(e).

220. *Geer v. Bennett*, 237 So.2d 311, 315 (Fla. 4th Dist. 1970).

221. *Id.* See also *Bond v. Koscot Interplanetary, Inc.*, 246 So.2d 631, 633 (Fla. 4th Dist. 1971).

222. *Bond v. Koscot Interplanetary, Inc.*, 246 So.2d 631 (Fla. 4th Dist. 1971); *Geer v. Bennett*, 237 So.2d 311 (Fla. 4th Dist. 1970); *Hendler v. Rogers House Con., Inc.*, 234 So.2d 128 (Fla. 4th Dist. 1970); *Nantell v. Lim-Wick Constr. Co.*, 228 So.2d 634, 637 (Fla. 4th Dist. 1970); *Popwell v. Abel*, 226 So.2d 418 (Fla. 4th Dist. 1969).

It should be noted that pursuant to FLA. R. CIV. P. 1.130(b) any exhibit attached to a pleading as an exhibit "shall be considered part thereof for all purposes." In *Harry Pepper & Assoc., Inc. v. Lasseter*, 247 So.2d 736 (Fla. 3d Dist. 1971), *cert. denied*, 252 So.2d 797 (Fla. 1971), the court held that in considering a motion to dismiss, the trial court had to consider a deposition attached to the complaint as an exhibit. The court also noted that where there is an inconsistency between the allegations of the complaint and the facts set forth in an exhibit, the effect is a neutralization of each allegation against the other which renders the pleading objectionable.

223. *Bond v. Koscot Interplanetary, Inc.*, 246 So.2d 631, 633 (Fla. 4th Dist. 1971), *citing Russell v. Community Blood Bank, Inc.*, 185 So.2d 749, 750 (Fla. 2d Dist. 1966).

224. *Nantell v. Lim-Wick Constr. Co.*, 228 So.2d 634, 637 (Fla. 4th Dist. 1970).

225. *Id.*

226. *Geer v. Bennett*, 237 So.2d 311 (Fla. 4th Dist. 1970).

227. "A motion to dismiss a complaint must be decided on questions of law and questions of law only." *Id.* at 315. See also *Nantell v. Lim-Wick Constr. Co.*, 228 So.2d 634 (Fla. 4th Dist. 1969).

forth a cause of action "upon any ground," a motion to dismiss should be denied.<sup>228</sup> However, "[a] motion to dismiss a complaint for failure to state a cause of action does not reach the defects of vague and ambiguous pleading."<sup>229</sup> The proper vehicle to reach this type of situation is a motion to strike under rule 1.140(f) or a motion for more definite statement under rule 1.140(e).

In *Fountainebleau Hotel Corp. v. Walters*,<sup>230</sup> the Supreme Court of Florida quashed a lower court ruling which affirmed a trial court's dismissal of a complaint. The court held that where a complaint was adequately framed to sufficiently acquaint the defendant with the plaintiff's claim to allow an intelligent response, it was not necessary for the plaintiff to state the theory of his case in the pleadings, and the trial court improperly dismissed the complaint.<sup>231</sup> In a case where a motion to strike was filed,<sup>232</sup> the District Court of Appeal, Fourth District, held that "[a] motion to strike an affirmative defense alleged in an answer tests the legal sufficiency of such defense."<sup>233</sup> In so holding, the court reversed a lower court order striking an affirmative defense of lack of consideration in a suit brought against an estate executor on a promissory note. Indicating that the lower court most likely had ruled in that manner because of a deposition on file in which the executor indicated that the defense was based on oral representations made by a decedent to him, the court rejected this reasoning and stated that:

Lack of consideration being a valid defense to a suit on a promissory note, . . . it was error to strike such defense . . . . It may be that at the trial the defendant will be unable to offer any competent evidence to sustain such affirmative defense . . . [b]ut a defense which is legally sufficient is not subject to a motion to strike . . . simply because at some time prior to trial it appears that the defendant may be unable to produce evidence at the trial to sustain such defense.<sup>234</sup>

After the pleadings have been filed, and before trial, a defendant can move for a judgment on the pleadings pursuant to rule 1.140(c). In passing on such a motion, the court applies the same test used in determining a motion to dismiss and proceeds under the same presumptions of the

228. *Bond v. Koscot Interplanetary, Inc.*, 246 So.2d 631, 633 (Fla. 4th Dist. 1971). See authorities cited therein.

229. *Fountainebleau Hotel Corp. v. Walters*, 246 So.2d 563, 565 (Fla. 1971).

230. *Id.* See Section IV, A, 1, notes 136-39 *supra* and accompanying text.

231. While the second amended complaint might well have been subject to a motion for more definite statement under F.R.C.P. 1.140(e), or a motion to strike under F.R.C.P. 1.140(f), the record that is now before us demonstrates that the complaint was clearly sufficient to state a claim for relief under F.R.C.P. 1.110(b), should not have been dismissed with prejudice, and should proceed to trial on the issue made by an answer.

*Id.* at 566.

232. *Windle v. Sebold*, 241 So.2d 165 (Fla. 4th Dist. 1970).

233. *Id.* at 166.

234. *Id.*

truthfulness of the allegations of the non-moving party.<sup>235</sup> However, a defendant may not rely upon, nor may the court consider, the allegations contained in the defendant's answer for purposes of the motion.<sup>236</sup> Therefore, in an employment contract action where the defendant denied the plaintiff's allegations regarding the length of time of employment, the trial court acted improperly in granting a judgment on the pleadings for the defendant since an issue of fact had been clearly raised.<sup>237</sup> In addition, a judgment on the pleadings cannot be granted pursuant to rule 1.140(c) on the basis of uncontroverted allegations in a defendant's answer where no responsive pleading is required by the procedural rules, because all such allegations are deemed denied.<sup>238</sup>

There is another similarity which exists between a motion to dismiss and a motion for judgment on the pleadings. While it is correct to grant a motion for judgment on the pleadings of the plaintiff's complaint if legally insufficient, the entry of final judgment on the pleadings may be a harsh result. In two cases where the courts pointed to the similarity between a motion for judgment on the pleadings and a motion to dismiss,<sup>239</sup> final judgments were reversed with orders to allow the filing of an amended complaint. In one of the cases, *Baird v. Continental Insurance Co.*,<sup>240</sup> the District Court of Appeal, Fourth District, held that "the rules should not be so finely drawn as to prohibit a second chance to plead an acceptable cause of action . . ."<sup>241</sup> It is probably safe to assume, then, that the Florida Rules of Civil Procedure will not be interpreted in such a fashion as to deny a plaintiff his remedy on procedural technicalities, though it is equally clear that those same rules (especially regarding motions for judgment on the pleadings) will also not be interpreted to allow frivolous and inadequate actions to continue unchecked.

A recent decision rendered by the District Court of Appeal, Third District, relating to hearings and notices affects motion practice in general.<sup>242</sup> In that case involving consolidated appeals, defendants had filed motions to dismiss in response to complaints filed against them. The

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235. "In passing on such a motion made by defendant all well pleaded material allegations of the complaint and all fair inferences to be drawn therefrom must be taken as true and the inquiry is whether the plaintiff has stated a cause of action in his complaint." *Glidden Co. v. Zuckerman*, 245 So.2d 639, 640 (Fla. 3d Dist. 1971), *adopting the language of Reinhard v. Bliss*, 85 So.2d 131, 133 (Fla. 1956). *See also* *London Distrib. Co. v. Bastone*, 244 So.2d 550 (Fla. 3d Dist. 1971); *White v. Strange*, 237 So.2d 16 (Fla. 1st Dist. 1970).

236. "It is well established that the allegations of the answer are deemed denied, where no reply is required and such allegations cannot be a basis for any such judgment on the pleadings." *Glidden v. Zuckerman*, 245 So.2d 639, 640 (Fla. 3d Dist. 1971).

237. *White v. Strange*, 237 So.2d 16 (Fla. 1st Dist. 1970).

238. *City of Pompano Beach v. Oltman*, 228 So.2d 610 (Fla. 4th Dist. 1969) (per curiam).

239. *International Design, Inc. v. Rubin's Franchises, Inc.*, 247 So.2d 778 (Fla. 3d Dist. 1971); *Baird v. Continental Ins. Co.*, 237 So.2d 206 (Fla. 4th Dist. 1970), *cert. denied*, 241 So.2d 858 (Fla. 1970).

240. 237 So.2d 206 (Fla. 4th Dist. 1970), *cert. denied*, 241 So.2d 858 (Fla. 1970).

241. *Id.*

242. *Polland v. Visual Graphics Corp.*, 240 So.2d 835 (Fla. 3d Dist. 1970).

motions were noticed for hearing on a certain date, but because of the judge's illness were not heard on that day. However, notice appeared in a legal newspaper which had been designated by the circuit court as official, shifting all hearings scheduled for that day to another date. Later, another notice was published in the same newspaper, but on the appointed day, the plaintiffs failed to show, and their actions were dismissed with prejudice. Subsequent motions and supporting affidavits to set aside the final dismissal were denied, and an appeal was taken. The Third District set aside the dismissals and held pursuant to rule 1.090(d) that written notice to the plaintiffs should have preceded the later hearing and that the failure to do so was fatal. The court indicated that the purpose of the rule was to provide proper notice to a party which had not been accomplished. Rejecting the appellees' contention that the rule's requirements were satisfied by publication of notice in the circuit court's "official newspaper," Chief Judge Pearson, speaking for the court, stated that a local court rule could not be made which overruled the requirements of the rules of procedure, and that "there is no showing that the designation of the official newspaper was intended to or could have the effect of making notices therein a substitute for written notices required by the Florida Rules of Civil Procedure."<sup>243</sup>

### C. Pretrial Conference

The pretrial conference is designed to streamline the litigation process by providing for the simplification of issues, the amendment of pleadings if necessary, the securing of admissions of fact and documents to obviate unnecessary proof at trial, the limitation of the number of expert witnesses, and any other matters which may aid in the disposition of the action.<sup>244</sup> Pursuant to rule 1.200, the conference is not compulsory, but must be held if either party or the court desires such a meeting.<sup>245</sup> In addition, if an attorney or party fails to appear at such a conference the court "may dismiss the suit or strike the answer or take such action as justice requires."<sup>246</sup> However, in *Goldman v. Tabor*,<sup>247</sup> the District Court of Appeal, Second District, reversed a lower court ruling which entered a default judgment and struck all of the pleadings of a defendant whose attorney had failed to attend a pretrial conference. Noting that the defendant's attorney claimed that he had received no notice (which was not refuted

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243. *Id.* at 836.

244. FLA. R. CIV. P. 1.200. The rule also provides for a determination of the advisability of referring certain or all of the issues to a special master "for findings of fact for use by the court for pre-trial purposes . . ." *Id.*

245. All of the federal district courts in Florida require such a conference in every civil case. *See* Rule 5, United States District Court for the Northern District of Florida (1971); Rule 10, United States District Court for the Middle District of Florida (1968); General Rule 14, United States District Court for the Southern District of Florida (1971).

246. FLA. R. CIV. P. 1.200.

247. 239 So.2d 529 (Fla. 2d Dist. 1970).

by the plaintiff), the court observed that "such action . . . punishes the litigant rather than the attorney."<sup>248</sup>

Even though a pretrial conference is normally followed rather closely by the trial, the holding of the conference does not terminate the right to take depositions, and a deposition should not be cancelled by the court simply because the notice of taking is delivered at the conference.<sup>249</sup> Any inequities in trial preparation can easily be balanced by the granting of a continuance. Similarly, the court has the power to refuse to permit a witness to testify whose name has not been furnished to the opposing party at the pretrial conference. However, in *Green v. Shoop*,<sup>250</sup> an action to recover a real estate brokerage commission, a Florida appellate court reversed a trial court order which refused to allow the testimony of a witness who had been a party to a transaction on the grounds that the calling of the witness and his testimony would not involve an element of surprise to the opposing party. The court recognized the wide discretion of a trial court in permitting or prohibiting the use of witnesses whose names had not been furnished to the opposing party, but stated that "the exercise of such discretion should be guided largely, though not exclusively, by whether the use of such a witness will prejudice the opposing party."<sup>251</sup>

## V. PARTIES

### A. Joinder of Insurers

In 1969, the Supreme Court of Florida decided *Shingleton v. Bussey*,<sup>252</sup> one of the most significant cases ever handed down on the question of insurer joinder. The court held that "a direct cause of action . . . inures to a third party beneficiary against an insurer in motor vehicle liability insurance coverage cases as a product of the prevailing public policy of Florida,"<sup>253</sup> and that the third party beneficiary doctrine encompassed actions brought "against an insurer in favor of members of the public injured through the acts of the insured."<sup>254</sup>

While noting that the liability of an insured is a condition precedent to finding any insurer liability, the court did not consider that fact to be sufficient to postpone the time when suit can be filed against an insurer. The court concluded that "there is nothing inherent in the general nature of liability insurance which would operate to preclude an injured third

248. *Id.*

249. *Brennan v. Board of Public Instruction*, 244 So.2d 463 (Fla. 4th Dist. 1971). See Section VII, B, 2 *infra*.

250. 240 So.2d 85 (Fla. 3d Dist. 1970).

251. *Id.* at 86.

252. 223 So.2d 713 (Fla. 1969), *aff'g* 211 So.2d 593 (Fla. 1st Dist. 1968). See Rose & Schmukler, *Civil Procedure, 1967-1969, Survey of Florida Law*, 24 U. MIAMI L. REV. 534, 550-52 (1970).

253. *Shingleton v. Bussey*, 223 So.2d 713, 715 (Fla. 1969) [hereinafter cited as *Shingleton*].

254. *Id.* at 716.

party beneficiary from directly suing and joining the insurer as a co-defendant in [an] action to determine the insured's liability."<sup>255</sup> Rejecting the binding effect of policy provisions which forbid joinder of or the filing of an independent action against an insurer as contrary to public policy and equal protection of the law, the supreme court held that the "'no joinder' restriction" contained in the policy before the court went "much too far and therefore should be construed as securing for the insurer only the right to assert nonliability and not the nonjoinder of the insured with the insurer as a condition precedent to the liability of the insurer."<sup>256</sup>

In interesting dicta, the court addressed itself to one of the primary reasons advanced in favor of nonjoinder of insurance companies, the fear of jury prejudice against the insurer. Chief Justice Ervin, speaking for the majority, indicated that this consideration could not serve to limit joinder provisions against insurers and played down the potential damage to carriers when he stated:

While we will not go so far as to assert that the above proposition has been all but obliterated by the more recent indications to the effect that the injection of insurance does not operate to increase the size of jury verdicts, we do think the stage has now been reached where juries are more mature. Accordingly, a candid admission at trial of the existence of insurance coverage, the policy limits of same, and an otherwise aboveboard revelation of the interest of an insurer in the outcome of the recovery action against insured should be more beneficial to insurers in terms of diminishing their overall policy judgment payments to litigating beneficiaries than the questionable "ostrich head in the sand" approach which may often mislead juries to think insurance coverage is greater than it is.<sup>257</sup>

However, the court recognized that the joinder provisions which would bring an insurer into an action might well raise particular issues between the insured and his carrier which would not be germane to the main action and would serve to further complicate it. An effective remedy for this situation was seen in the liberal severability rules<sup>258</sup> through which a court could require the adjudication of those issues peculiar to the insured in a separate trial. The court was quick to warn that such a separation "would not remove from the case the identity of all parties joined nor their claims and defenses and their right to participate and protect their respective interests."<sup>259</sup>

*Shingleton* raised as many questions as it answered, however, and eight months later the District Court of Appeal, First District, which had

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255. *Id.* at 717.

256. *Id.* at 718.

257. *Id.*

258. FLA. R. CIV. P. 1.270(b).

259. *Shingleton v. Bussey*, 223 So.2d 713, 720 (Fla. 1969).

originally decided *Shingleton*,<sup>260</sup> handed down *Beta Eta House Corp. v. Gregory*,<sup>261</sup> which expanded the application of *Shingleton*. The question before the First District was whether the *Shingleton* insurer joinder doctrine applied only to automobile insurance carriers or to other forms of liability insurance as well. Noting that the supreme court had enunciated a broader rule in *Shingleton* than had the First District, the court held that "a liability insurance carrier is a proper party defendant in any suit for damages brought against its insured for damages proximately caused by the latter's negligence within the coverage provisions of the policy."<sup>262</sup>

The First District's decision was a natural outgrowth and extension of *Shingleton* and, had it stopped at that point, much confusion might have been avoided. But it did not. The court continued and noted that the liberal joinder provisions were procedural innovations and that *Shingleton* was not intended to nor did it change any substantive law.

Such innovation does not diminish in any manner the obligatory judicial concern to preserve the purity of the jury verdict and to prevent irrelevant factors from being injected into the trial of a case which may in any manner prejudice the jury in arriving at a fair and impartial verdict on the issues presented for decision.<sup>263</sup>

Implicit in the court's holding was that the existence of insurance coverage should be kept from a jury since it tended to unfairly effect the jury's verdict. Looking to rule 1.270(b) which provides for severability of actions as a procedural device which could be utilized to insure a fair trial free from prejudice, the court held that upon motion of a party "issues relating to the cause of action sued upon [should] be first tried under circumstances which exclude any reference to insurance, insurance coverage or joinder in the suit of the insurer as codefendant."<sup>264</sup> Upon completion of that trial, a second trial could then be held if the plaintiff has been victorious in the first suit, and if questions of coverage were left to be litigated. Barring such disputes, the first verdict would bind the insurer up to the policy limits. According to the First District, "[s]uch procedure would preserve for the plaintiff those desirable benefits flowing from the privilege of being able to bring a direct action against the insurer . . ."<sup>265</sup>

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260. *Bussey v. Shingleton*, 211 So.2d 593 (Fla. 1st Dist. 1968).

261. 230 So.2d 495 (Fla. 1st Dist. 1970).

262. *Id.* at 499.

263. *Id.* at 499-500.

264. *Id.* at 500.

265. *Id.*

It has been alluded to both in this and the Supreme Court's decisions in the *Shingleton-Bussey* case that juries have reached such a stage of maturity and sophistication where disclosure during trial of insurance protection held by a defendant no longer has a prejudicial effect upon their verdicts. If such assumption implies a concern for preserving the impartiality of the trial by proponents of the direct action theory, then the exclusion of such disclosure from the trial cannot in good faith be considered objectionable. By such exclusion the possibility of prejudice



The court certified both points to the supreme court as involving questions of great public interest.

In the intervening months between the First District's decision and the supreme court's response, several decisions were rendered on the question of joinder of insurance carriers. The First District itself decided one case holding that professional liability insurance carriers could be joined as party defendants in medical malpractice actions.<sup>266</sup> The District Court of Appeal, Second District, reached the same result.<sup>267</sup> However, none of these cases dealt with the severability of insurance carriers to avoid prejudicial influences on a jury. The stage was thus set for the Supreme Court of Florida to render its decision in *Beta Eta*.<sup>268</sup>

The court affirmed the extension of the joinder rule as applied by the First District and then turned to the question of jury prejudice and severability. Assessing the purpose of *Shingleton* as requiring "the parties to 'lay their cards on the table' in discovery proceedings, settlement negotiations, and pretrial hearings . . .,"<sup>269</sup> the court emphatically stated that the existence and limits of insurance coverage are not to be considered by a jury. The court impliedly accepted the two-trial rule established by the First District, observing that questions of coverage and good faith settlement negotiations could just as easily be litigated at a later time. Chief Justice Ervin and Justice Boyd, while concurring with the extension of *Shingleton* to all liability carriers, filed strong dissents to the court's implied adoption of the two-trial rule. The two justices interpreted their brother justices' opinion as affirming the First District's holding that "'absent extraordinary circumstances' the trial court *should* authorize separate trials under Rule 1.270(b) . . . for the defendant tortfeasor and his insurer."<sup>270</sup> This holding was viewed by the two justices as gutting *Shingleton* and as a distortion of the "law of severance by requiring special treatment of liability insurance carriers not afforded other codefendants."<sup>271</sup>

Following this decision, confusion was legion. In response, the supreme court handed down *Stecher v. Pomeroy*<sup>272</sup> in October 1971. In that decision, which discharged a writ of certiorari, the court discussed the

will be eliminated consistent with the long-standing principle of substantive law recognized in this state, and the defendant's right to an impartial trial on the issue of negligence will be preserved.

*Id.*

266. *Shipman v. Kinderman*, 232 So.2d 21 (Fla. 1st Dist. 1970).

267. *Vilord v. Jenkins*, 240 So.2d 68 (Fla. 2d Dist. 1970); *Pyles v. Bridges*, 239 So.2d 279 (Fla. 2d Dist. 1970). Both of these decisions cited *Shingleton* and *Beta Eta House Corp. v. Gregory*, 230 So.2d 495 (Fla. 1st Dist. 1970).

268. *Beta Eta House Corp. v. Gregory*, 237 So.2d 163 (Fla. 1970) [hereinafter cited as *Beta Eta*].

269. *Id.* at 165.

270. *Id.* at 166 (Boyd, J., dissent) (emphasis added).

271. *Id.*

272. 253 So.2d 421 (Fla. 1971) See *Stecher v. Pomeroy*, 244 So.2d 488 (Fla. 4th Dist. 1971). See also Note, 26 U. MIAMI L. REV. 255 (1971).

problems that had arisen with *Shingleton* and *Beta Eta*,<sup>273</sup> specifically the problem of jury prejudice occasioned by mention of insurance limits and severability of actions involving insurers. Addressing itself to the first point, the court held that while the mention of insurance limits was certainly improper, it was not always harmful error. In the case before it, the court suggested that a clear case of harmless error was present since there had been a recovery of only \$19,000 despite policy limits of \$100,000/\$300,000 and serious injuries suffered. It was indicated, though, that the finding of harmless error in that case "is not to be regarded as approval . . . of the mention of policy limits to a jury."<sup>274</sup>

Turning to the second point, the majority held that while a severance might in some instances be granted as provided by rule 1.270(b), "absent a justiciable issue relating to *insurance*, such as a question of coverage or of the applicability or interpretation of the insurance policy or other such valid dispute on the matter of insurance coverage, there is no valid reason for a severance and it should NOT be granted."<sup>275</sup> Mr. Justice Dekle stated that *Shingleton* spoke of severing only issues between insured and insurer, not on questions of negligence liability.<sup>276</sup> Thus, while not specifically admitting a change, the supreme court expressly overruled both its decision and that of the First District in *Beta Eta* as that ruling related to severance of liability insurers.

The law in Florida now appears to be as follows: A party may join as a codefendant the insurance carrier of a defendant-tortfeasor in any tort action where the insurer is providing liability coverage for the defendant-insured. If, however, any issues arise between the insured and his insurer which are not germane to the main action and would only serve to complicate the progress of that action, the court may sever those issues and require separate trials.<sup>277</sup> Under no circumstances, though, will severance be effected solely to prevent jury prejudice against the insurer, and while there must be full disclosure of limits and coverage between the parties, this information is not to be presented to the jury

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273. See Note, 24 U. MIAMI L. REV. 845 (1970).

274. *Stecher v. Pomeroy*, 253 So.2d 421, 422 (Fla. 1971).

275. *Id.* at 424 (capitalization and emphasis in original).

276. The insurance carrier's position as a real party in interest is a position of continuing interest which includes the trial of the cause which a third party has asserted against its insured. To rule otherwise on a motion for severance would be to defeat the purposes of the rule enunciated in these cases with regard to the real party in interest so as to reflect the presence of financial responsibility which should be left apparent before the jury (without other express mention, of course) and the other bases set forth in those holdings. The routine granting of such motions for severance except for such good cause related to insurance coverage would be a misapprehension of this Court's holding.

*Id.*

277. The question of whether or not a separate trial will be allowed is a discretionary matter to be decided by the trial judge. "An insurer does not have an absolute right to severance." *Hartford Accident & Indem. Co. v. Myers*, 247 So.2d 83, 84 (Fla. 2d Dist. 1971). See also *Beta Eta House Corp. v. Gregory*, 237 So.2d 163 (Fla. 1970); *Stecher v. Pomeroy*, 244 So.2d 488 (Fla. 4th Dist. 1971).

since it is irrelevant. However, if such information is presented to the jury, harmful error must be shown to warrant reversal.

### B. *Intervention*

Rule 1.230 provides that any interested person may be permitted to intervene in an action, but the intervening party's claim will be subordinated to the main action unless the court orders otherwise. All interventions are at the discretion of the court. Subject to the qualification of subordination to the main action, though, "an intervenor is a party for all purposes with the same rights and privileges of other parties to the cause." In addition, the intervenor "is bound by the court's judgment entered in the cause and may appeal any adverse ruling to him."<sup>278</sup>

There are several criteria which must be met to qualify for intervention. The applicant's interest must be shown to be involved in the litigation; it must be direct and immediate; and it must be shown that the intervenor "will gain or lose by the direct legal operation and effect of the judgment. A showing of indirect, inconsequential or contingent interest is wholly inadequate . . ."<sup>279</sup> Thus, in a suit brought by a distiller who manufactured liquor inside and outside the state and claimed that a recently-enacted Florida statute<sup>280</sup> created a larger tax burden on it than on out-of-state distillers, a trial court correctly refused to permit an in-state distiller to intervene because the tax rate of its products was not in issue, nor was there any immediate or direct threat to it.<sup>281</sup> However, an insurance company which has subrogation rights under an insurance contract does have a sufficient interest to intervene as a party plaintiff in a suit based upon personal injuries where the insurer had paid out over \$4,000 in medical bills.<sup>282</sup>

## VI. INTERPLEADER

When the disposition of any fund or property is in question, an interested or disinterested party may use the procedural device of interpleader and name as adverse claimants all persons who may have an interest in the fund. The claims of the different persons need not be identical nor arise from the same source to be actionable, and any of the named defendants may counterclaim or cross-claim.<sup>283</sup>

Historically, the right to file an interpleader action was considered to be an equitable remedy. However, in 1962, the remedy was codified for the first time in the Florida Rules of Civil Procedure. The rule

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278. *Greenhut Constr. Co. v. Henry A. Knott, Inc.*, 247 So.2d 517, 519-20 (Fla. 1st Dist. 1971).

279. *Faircloth v. Mr. Boston Distiller Corp.*, 245 So.2d 240, 244 (Fla. 1970).

280. Fla. Laws 1970, ch. 70-225, *amending* FLA. STAT. §§ 561.46(5)(b), 561.461(2), 561.64(2) (1969).

281. *Faircloth v. Mr. Boston Distiller Corp.*, 245 So.2d 240 (Fla. 1971).

282. *Blue Cross of Florida, Inc. v. O'Donnell*, 230 So.2d 706 (Fla. 3d Dist. 1970).

283. FLA. R. CIV. P. 1.240. *See* C. WRIGHT, FEDERAL COURTS § 74 (2d ed. 1970).

regulating the interpleader remedy, rule 1.240, "does away with many of the restrictions imposed upon [it] by case law and virtually eliminates the tenuous distinctions between a 'strict bill of interpleader' and 'an action in the nature of interpleader.'"<sup>284</sup> Indeed, when the remedy was codified in the Florida Rules of Civil Procedure, it "became subject to all of the other appropriate Rules of Civil Procedure . . ."<sup>285</sup>

In *Trak Microwave Corp. v. Medaris Management, Inc.*,<sup>286</sup> the District Court of Appeal, Fourth District, expressly held that rule 1.170(b), which provides for permissive counterclaims "against an opposing party not arising out of the transaction or occurrence that is the subject matter of the *opposing party's claim* . . .," authorizes a counterclaim to be filed by a defendant against the plaintiff-stakeholder in an interpleader action.<sup>287</sup> In so holding, the court rejected secondary authorities which suggested a contrary position<sup>288</sup> and other cases both federal<sup>289</sup> and state<sup>290</sup> which held to the contrary. Citing the language of rule 1.010, which specifies that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action . . .," the court found that "it is not in keeping with the spirit of the Rules . . . to lay down a blanket interpretation absolutely denying permissive counterclaims in all interpleader actions."<sup>291</sup> As a result of this decision<sup>292</sup> and

284. *Trak Microwave Corp. v. Medaris Management, Inc.*, 236 So.2d 189, 191-92 (Fla. 4th Dist. 1970).

285. *Id.* at 192.

286. 236 So.2d 189 (Fla. 4th Dist. 1970).

287. *Id.* at 192 (emphasis in original), *citing* FLA. R. CIV. P. 1.170(b).

288. The court expressly dismissed a statement in FLORIDA JURISPRUDENCE which maintained that "a cross-claim against the interpleading complainant is inadmissible, and he should not *ordinarily* be made a party to a counterclaim by one of the defendants against the other." *Id.* at 191 (emphasis added), *citing* 18 FLA. JUR. *Interpleader* § 15, at 384 (1958). The court stated that the authorities cited by FLORIDA JURISPRUDENCE were not persuasive and insufficient to support that "bald statement."

289. The court, in analogizing the Florida provision with FED. R. CIV. P. 13 and 22(1), rejected "several federal decisions which hold that a counterclaim *is not* proper in an interpleader action because the plaintiff . . . is not an 'opposing party' and, . . . cannot be made the subject of a permissive counterclaim." The court felt that this was an "unduly restrictive interpretation" of "opposing party" as used in the permissive counterclaim rule. The court referred to other cases which held to the contrary and cited 3A J. MOORE, FEDERAL PRACTICE § 22.15, at 3129 (2d ed. 1969) as supporting its position. *Trak Microwave Corp. v. Medaris Management, Inc.*, 236 So.2d 189, 192 (Fla. 4th Dist. 1970).

290. The court considered the language in *Pan American Surety Co. v. Cooke*, 130 So.2d 290 (Fla. 3d Dist. 1961) (counterclaim found improper after interpleader dismissed) to be "rather difficult to understand" and refused to follow it since the case was decided before the codification of the interpleader remedy and was not on point, even though the District Court of Appeal, Third District, later followed that case in *Aquilina v. Mangus*, 223 So.2d 786 (Fla. 3d Dist. 1969). The court in *Trak* looked rather to *Riverside Bank v. Florida Dealers & Growers Bank*, 151 So.2d 834 (Fla. 1st Dist. 1963), where the District Court of Appeal, First District, had permitted a counterclaim in a suit in the nature of interpleader. *Trak Microwave Corp. v. Medaris Management, Inc.*, 236 So.2d 189, 192-93 (Fla. 4th Dist. 1970).

291. *Trak Microwave Corp. v. Medaris Management Co.*, 236 So.2d 189, 192 (Fla. 4th Dist. 1970). The court indicated that the trial judge could still sever the counterclaim from the interpleader action under rule 1.250 "to prevent a permissive counterclaim from embarrassing the interpleader action." *Id.*

292. (as to pure interpleader actions).

*Riverside Bank v. Florida Dealers and Growers Bank*,<sup>293</sup> the law appears fairly clear that permissive counterclaims may be filed against the plaintiff-stakeholder in interpleader actions and actions in the nature of interpleader pursuant to rule 1.170(b). Indeed, the language of the instant decision could well be used as authority for the proposition that cross-claims against the plaintiff-stakeholder may also be authorized under the rules.

Two cases were decided during the survey period which turned on the question of the award of attorney's fees in interpleader actions. In the first case, *De Garcia v. Seiglie*,<sup>294</sup> the plaintiff-stakeholder was an officer of a trust company in Cuba prior to the political upheavals in that country, and in his capacity as trustee, he had a number of stock certificates in his possession. A dispute arose among the beneficiaries of the trust, with one of the beneficiaries claiming absolute ownership of the stock while her three children claimed that she owned only a life estate in the securities. The trustee deposited the stock into the registry of the circuit court, and the court found that the mother had only a life estate with the remainder interest vested in her codefendant children. The court assessed attorney's fees against the mother in favor of the plaintiff-stakeholder and one of the other codefendants, and an appeal was taken. The District Court of Appeal, Fourth District, held that "any award of attorney's fees to the plaintiff in interpleader is paid from the fund which has been brought into court."<sup>295</sup> In addition, the court held that "when such attorney's fee is paid from the fund, the burden eventually falls on the defendant who was in the wrong and who made the litigation necessary."<sup>296</sup> While the court affirmed the award of fees against the unsuccessful claimant, that portion of the trial judge's order which assessed attorney's fees for one of the other claimants was reversed. The Fourth District reasoned that once an interpleader action had been commenced in the trial court, the stakeholder's involvement ceased, and the suit became "in effect . . . a new and independent proceeding between the defendants . . ." The court reemphasized that "the law seems to be well settled in this jurisdiction that attorney's fees cannot be taxed as costs in the absence of a statute, contract or agreement of the parties."<sup>297</sup>

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293. 151 So.2d 834 (Fla. 1st Dist. 1963) (as to actions in the nature of interpleader). See note 290 *supra*.

294. 230 So.2d 37 (Fla. 4th Dist. 1970).

295. *Id.* at 38, citing *McKinnon v. Reliance Ins. Co.*, 113 Fla. 370, 151 So. 699 (1933); *Lucco v. Treadwell*, 127 So.2d 461 (Fla. 2d Dist. 1961); *Brown v. Marsh*, 98 Fla. 253, 123 So. 762 (1929) (dicta).

296. *Id.* The court also cited with seeming approval language in *Lucco v. Treadwell*, 127 So.2d 461 (Fla. 2d Dist. 1961) (*supra* note 295) which held that it was "not reversible error for the court to assess the award directly against such defendant rather than assessing the award against the fund." *DeGarcia v. Seiglie*, 230 So.2d 37, 38 (Fla. 4th Dist. 1970).

297. *De Garcia v. Seiglie*, 230 So.2d 37, 39 (Fla. 4th Dist. 1970). The court also rejected the appellee's contention that her involvement was in fact a protection of the fund under the purview of FLA. STAT. §§ 690.13(2), 690.14(1) (1967), stating that "the attorney did not

In the second case,<sup>298</sup> the District Court of Appeal, Second District, held that a trial court was correct in awarding attorney's fees to the plaintiff-stakeholder and assessing those costs against the codefendant who had made the original claim on the fund because the plaintiff was an innocent stakeholder who had not caused the conflict to arise, but was in peril of double vexation simply because he held the funds in his possession. The case involved a suit on a brokerage commission where a number of brokers had laid claim to the monies held by the plaintiff who had no monetary stake in the funds or the transactions giving rise to the dispute.

## VII. DISCOVERY<sup>299</sup>

### A. Scope

Generally, the scope of discoverable matters is governed by rule 1.280(b) which provides that discovery may be had of "any matter, not privileged, which is relevant to the subject matter of the pending action . . . ." Under that provision, objection cannot be made to discovery on the grounds that materials sought will not be admissible at trial. As long as the material "appears reasonably calculated to lead to the discovery of admissible evidence . . . ," it is discoverable.<sup>300</sup>

The breadth of discovery under the liberalized provisions of rule 1.280(b) is wide and is meant to be.<sup>301</sup> Indeed, a primary purpose of the discovery rules is to prevent the "use of surprise, trickery, bluff and legal gymnastics" in law actions, and "[r]evelation through discovery procedures of the strength and weaknesses of each side before

preserve or protect a fund but only preserved and protected his client's right to a remainder interest in the fund." *Id.*

298. *Al Ro, Inc. v. Palermo*, 230 So.2d 57 (Fla. 2d Dist. 1970), citing *Ellison v. Riddle*, 166 So.2d 840 (Fla. 2d Dist. 1964).

299. Under recently proposed revisions now enacted by the Supreme Court of Florida (effective January 1, 1973), the discovery rules have undergone radical changes. They have been brought into line with their federal counterparts, FED. R. CIV. P. 26-37. See *In re The Florida Bar: Rules of Civil Procedure*, 265 So.2d 21 (Fla. 1972).

300. FLA. R. CIV. P. 1.280(b). See FED. R. CIV. P. 26(b). Even if materials sought do not contain "the expected relevancy and produced no evidence admissible at trial, the rule contemplates only that testimony sought 'appears reasonably calculated to lead to the discovery of admissible evidence' . . . ." *Spencer v. Spencer*, 242 So.2d 786, 789 (Fla. 4th Dist. 1970) (emphasis added by court), cert. denied, 248 So.2d 169 (Fla. 1971); citing FLA. R. CIV. P. 1.280(b).

301. (b) *Scope of Discovery*. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General*. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FLA. R. CIV. P. 1.280(b)(1). This rule is the discovery syllabus, and most discovery rules look to it to determine scope.

trial encourages settlement of cases and avoids costly litigation.<sup>302</sup> The sought-after result is that each party to a suit will be capable of making "an intelligent evaluation of the entire case and may better anticipate the ultimate results."<sup>303</sup> There are only four exceptions to the general rule of complete disclosure:<sup>304</sup> 1) the subject matter of the inquiry must be relevant to the cause of action;<sup>305</sup> 2) discovery may not be used to harass, embarrass, or malign parties or witnesses;<sup>306</sup> 3) privileged communications between lawyers and clients may not be discovered;<sup>307</sup> and 4) the work product of a litigant or his attorney prepared in anticipation of litigation may not be examined without a showing of rare and exceptional circumstances.<sup>308</sup>

#### 1. INSURANCE LIMITS<sup>309</sup>

In *Shingleton v. Bussey*,<sup>310</sup> *Beta Eta House Corp. v. Gregory*,<sup>311</sup> and *Stecker v. Pomeroy*,<sup>312</sup> the Supreme Court of Florida clearly laid down the law in the state regarding the discovery of an adverse party's insurance limits in an action. The court in *Beta Eta* and *Stecker* stated emphatically that this information is discoverable.

In establishing the first radical shift in Florida law in many years on the question of the joinder of insurance companies in actions arising out of the tortious conduct of their insureds, the supreme court in *Shingleton* held that

a candid admission at trial of the existence of insurance coverage, the policy limits of same, and an otherwise aboveboard revelation of the interest of an insurer in the outcome of the recovery action against [an] insured should be more beneficial to insurers . . . than the questionable 'ostrich head in the sand' approach which may often mislead juries to think insurance coverage is greater than it is.<sup>313</sup>

The court additionally advocated that "all the cards [should be] on the table . . ." in this type of action.<sup>314</sup> If there were, however, any doubt remaining as to the exact intent of the court in *Shingleton*, it became

302. *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 111 (Fla. 1970).

303. *Id.*

304. All four exceptions and supporting authorities are set forth in *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 111-12 (Fla. 1970).

305. See FLA. R. CIV. P. 1.280(b).

306. See FLA. R. CIV. P. 1.310(b), 1.340.

307. See 35 FLA. JUR. *Witnesses* §§ 144-51 (1961).

308. See *Miami Transit Co. v. Hurns*, 46 So.2d 390, 391 (Fla. 1950). See also FLA. R. CIV. P. 1.280(b) (2).

309. See Section V, A, *supra*.

310. 223 So.2d 713 (Fla. 1969).

311. 237 So.2d 163 (Fla. 1970).

312. 253 So.2d 421 (Fla. 1971).

313. *Shingleton v. Bussey*, 223 So.2d 713, 718 (Fla. 1969).

314. *Id.* at 720.

apparent one year later in *Beta Eta* where the court interpreted *Shingleton* "to require the parties to 'lay their cards on the table' in discovery proceedings, settlement negotiations, and pre-trial hearings."<sup>315</sup> Later in *Stecher*, the court indicated its recognition that *Shingleton* and *Beta Eta* had created a whole new area of discoverable materials which had theretofore been inaccessible to the litigant.<sup>316</sup> "The reasons were for purposes of negotiation as to encourage settlement between the parties and thus shorten litigation and speed up the courts' heavy trial dockets."<sup>317</sup>

Following the lead of the supreme court, the District Court of Appeal, Third District, held in *Montano v. Wigfield*<sup>318</sup> that policy limits are discoverable if such information is relevant to the subject matter of the action. In so holding, the Third District made passing reference to the supreme court's admonition that such information is still not admissible at an insured's trial,<sup>319</sup> but indicated that such information may indeed "be relevant and admissible in the event there is a separate trial against the insurance carrier."<sup>320</sup> In short, then, it appears clear in Florida that the insurance limits of any insured involved in a lawsuit are discoverable as long as the widely-interpreted and broadly applied relevancy test under rule 1.280(b) is met.<sup>321</sup>

## 2. WORK PRODUCT

One of the categories of materials which is generally nondiscoverable is material which is compiled or developed specifically in connection with litigation, that is, work product. However, even work product may be discoverable if a strong enough showing is made, and the court so orders.<sup>322</sup> During the survey period, there were a number of cases decided which dealt specifically with work product questions.

315. *Beta Eta House Corp. v. Gregory*, 237 So.2d 163, 165 (Fla. 1970).

316. "One of the objections of Beta and Bussey was to provide a disclosure of policy limits *between the parties* which had not previously been allowed." *Stecher v. Pomeroy*, 253 So.2d 421, 423 (Fla. 1971) (emphasis in original). See FED. R. CIV. P. 26(b)(2).

317. *Id.* at 423.

318. 239 So.2d 609 (Fla. 3d Dist. 1970).

319. "The existence or amount of insurance coverage has no bearing on the issues of liability as damages, and such evidence should not be considered by the jury." *Beta Eta House Corp. v. Gregory*, 237 So.2d 163, 165 (Fla. 1970). Later, in *Stecher*, the court expanded on this point:

It was never intended that policy limits should go to the jury and Beta Eta expressly said so. It is immaterial for the jury's consideration, because the principles still stand that its decision must rest solely upon the evidence and the law as charged. Moreover, to reveal defendants' amount of insurance before the jury would equally entitle a defendant to bring out his coverage when the limits are minimal and advantageous to him. Neither one has relevancy and has no place before the jury.

*Stecher v. Pomeroy*, 253 So.2d 421, 423 (Fla. 1971).

320. *Montano v. Wigfield*, 239 So.2d 609, 610 (Fla. 3d Dist. 1970).

321. See *Vilord v. Jenkins*, 240 So.2d 68 (Fla. 2d Dist. 1970) (discovery allowed of limits of doctor's medical malpractice coverage); *Duran v. McPherson*, 233 So.2d 639 (Fla. 4th Dist. 1970) (principles announced in *Shingleton* applicable to professional liability insurance in general).

322. See FLA. R. CIV. P. 1.280(b). See also FED. R. CIV. P. 26(b).



In *Shell v. State Road Department*,<sup>323</sup> the Supreme Court of Florida held that in condemnation proceedings the state would have to produce all materials in their possession relating to surveys, maps, appraisal reports, etc., when such documents were sought by a condemnee land owner. The court in that case specifically rejected the state's contention that such material was work product on grounds of public policy, even though it was recognized that such a holding was in opposition to prevailing discovery procedure. One year later, in *Bainbridge v. State Road Department*,<sup>324</sup> the District Court of Appeal, First District, held that *Shell* required a condemning authority in all eminent domain proceedings to divulge its entire work product to defendant land owners which related to the land which was sought to be acquired and suggested that a reciprocal right did not lie for the condemning authority.

The District Court of Appeal, Second District, found itself faced with a novel question in 1969, where a condemning authority, Pinellas County, moved the court to allow a deposition duces tecum of an expert appraiser retained by the defendant in preparation for litigation.<sup>325</sup> Notwithstanding the fact that the expert was not to testify at trial, the circuit court allowed the deposition, denied a requested protective order, and later permitted the appraiser to testify for the county over the objections of the defendant at trial. On appeal, the ruling was reversed, and the district court of appeal held that *Shell* "meant to except only the 'governmental authority' from the immunity protection of its work product, in contrast to the immunity protection of the private landowner condemnee."<sup>326</sup> The question was certified to the supreme court as presenting a question of great public interest, and the appellee applied for certiorari.

The supreme court accepted certiorari and reversed, holding that:

The fair rule is that the State may not initiate discovery in condemnation cases, except in a reciprocal right in those cases when the condemnee has elected to discover the State's work product . . . In the latter event the work product of the condemnee would be subject to discovery by the condemnor.<sup>327</sup>

Thus, the rule in eminent domain actions appears to be that the work product of a condemnee may not be made available to the condemning authority unless the condemnee has elected to examine the work product of the condemnor. Once the condemnor's work product has been requested and examined by the condemnee, then the condemnor has a reciprocal right of production.

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323. 135 So.2d 857 (Fla. 1961) [hereinafter cited as *Shell*]. See Massey & Westen, *Civil Procedure, 1961-1963 Survey of Florida Law*, 18 U. MIAMI L. REV. 745, 779-80 (1963).

324. 139 So.2d 714 (Fla. 1st Dist. 1962).

325. *Carlson v. Pinellas County*, 227 So.2d 703 (Fla. 2d Dist. 1969).

326. *Id.* at 707.

327. *Pinellas County v. Carlson*, 242 So.2d 714, 719 (Fla. 1970), *rev'g* 227 So.2d 703 (Fla. 2d Dist. 1969). *Followed*, *Corbett Motor Supply, Inc. v. City of Orlando*, 245 So.2d 93 (Fla. 4th Dist. 1971).

What exactly constitutes work product and is consequently immune from discovery is not always clearly definable. In *Surf Drugs, Inc. v. Vermette*,<sup>328</sup> the supreme court recognized this fact, but delineated certain types of work product which were immune from discovery:

Generally, those documents, pictures, statements and diagrams which are to be presented as evidence are not work products anticipated by the rule for exemption from discovery. Personal views of the attorney as to how and when to present evidence, his evaluation of its relative importance, his knowledge of which witness will give certain testimony, personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts he may refer to at trial for his convenience, but not to be used as evidence, come within the general category of work product.<sup>329</sup>

In that case, the court was reviewing a District Court of Appeal, Third District, decision<sup>330</sup> which had affirmed in part a circuit court order which ruled improper certain interrogatories which required a plaintiff to respond "on behalf of his agent, attorney, servant, employee, etc., as to the knowledge of certain facts and conclusions."<sup>331</sup> The supreme court rejected this ruling<sup>332</sup> and held that those interrogatories were not protected by the "work product" doctrine.

We hold, therefore, that a party may be required to respond on behalf of himself, his attorney, agent, or employee and to divulge names and addresses of any person having relevant information as well as to indicate generally the type of information held by the person listed. A party may not be required to set out the contents of statements, absent rare and exceptional circumstances, or to divulge his or his attorneys' evaluation of the substance of statements taken in preparation for trial.<sup>333</sup>

The court did, however, affirm the Third District's rejection of one interrogatory which demanded the identity of any person who had given an opinion to plaintiff or his attorney regarding the carelessness or negligence of the defendant company. This was held to exceed the bounds of proper discovery because it required an evaluation of the witness' testimony. The court also held that the plaintiff would be required to

328. 236 So.2d 108 (Fla. 1970).

329. *Id.* at 112.

330. *Vermette v. Surf Drugs, Inc.*, 226 So.2d 871 (Fla. 3d Dist. 1969).

331. *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 111 (Fla. 1970).

332. Appellee and the District Court apparently consider that anything known to an attorney for a litigant constitutes "work product" immune from discovery procedures. This view is clearly contrary to the *Hickman* case, supra, wherein the United States Supreme Court stated flatly:

A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney.

*Id.* at 113, citing *Hickman v. Taylor*, 329 U.S. 495, 504 (1947).

333. *Id.* at 113. The court also cited 4 J. MOORE, FEDERAL PRACTICE § 26.38[8.—3] (1969) which expands on this point.

disclose whether to his or his attorney's knowledge, any doctor had assigned a disability rating to the plaintiff's injured wife and the doctor's name and address. However, "[a]bsent exceptional circumstances,"—the plaintiff was not thought to be required to "give the percentage or nature of the disability rating or otherwise to summarize or evaluate the information available."<sup>334</sup> Thus, while the court emphatically rejected the theory which extends a mantle over any information in an attorney's possession, it was made clear that a party is not required to reveal case preparation materials, nor to submit any summaries or analyses of any of the issues in litigation.

In a similar vein, a county is not required to produce copies of in-department activity and accident reports prepared by the county as a result of an automobile accident between a police officer's municipally-owned vehicle and a privately-owned automobile which results in personal injuries and death. In *Dade County v. Monroe*,<sup>335</sup> a wrongful death action brought in connection with such an accident, the plaintiff maintained that the police officers and their superiors had knowledge of the accident and the chase which had preceded it. A motion was subsequently made and granted by the circuit court requiring the county to produce activity reports, dispatcher's cards and records, arrest reports of those involved in the accident, transcripts of all recorded and written reports by the officers, and various other departmental reports and records. On writ of certiorari to the District Court of Appeal, Third District, this order was reversed in part.

While recognizing that there were certain exceptions to the general rule that work product is non-discoverable, the court held that the circumstances in the case did not meet any of the requisites. The Third District reviewed the three exceptional situations set forth in *Hickman v. Taylor*<sup>336</sup> which would permit discovery: "(1) when witnesses are no longer available or can be reached only with great difficulty, (2) if it gives clues to relevant facts that cannot be secured otherwise, or (3) for purposes of impeachment."<sup>337</sup> However, the court did not find that the facts in this case justified the granting of an exception, even though the stated grounds urged by the appellee appeared to track the language of the *Hickman* exceptions.<sup>338</sup> It seems clear from this case, then, that

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334. *Id.*

335. 237 So.2d 598 (Fla. 3d Dist. 1970).

336. 329 U.S. 495 (1947).

337. *Dade County v. Monroe*, 237 So.2d 598, 601 (Fla. 3d Dist. 1970), *citing* *Miami Transit Co. v. Hurns*, 46 So.2d 390, 391 (Fla. 1950) [*citing* *Hickman v. Taylor*, 329 U.S. 495 (1947)].

338. Three grounds are set forth as justification of plaintiff's motion to produce the work product of petitioners: (1) such documents and records are necessary in order for the plaintiff to properly prosecute his law suit; (2) the sworn testimony of the patrolman driving the pursuing police vehicle and his companion in the criminal proceeding against the driver of the death vehicle conflicts with the sworn testimony in that proceeding of another witness; and (3) the sworn testimony of this same witness in the prior criminal proceeding conflicts with the affidavits of the police officers filed in the instant case.

an exception to the work product doctrine will be carefully considered, and that the court's determination will not necessarily be governed by the stated grounds urged upon the court, but rather by a careful analysis of the facts and evidence before the court.

Insurance reports have also been held to be work product items. In *Grand Union Co. v. Patrick*,<sup>339</sup> the Third District reversed a ruling granting the production of certain documents. The court held that reports prepared for an insurance company by an insured "are privileged<sup>340</sup> [in] that they are considered relevant to the defense of the action and in effect are communications between attorney and client, being information which is to benefit the defense of the cause by counsel, passing through the insurer to counsel."<sup>341</sup>

## B. Devices

### 1. INTERROGATORIES

Rule 1.340 prescribes the manner of serving interrogatories and defines their scope pursuant to rule 1.280(b).<sup>342</sup> While a party cannot be questioned about contents of statements made in preparation of trial or of his attorney's evaluation of those same statements unless an exceptional showing is made,<sup>343</sup> "a party may be required to respond on behalf of himself, his attorney, agent, or employee and to divulge names and addresses of any person having relevant information as well as to indicate generally the type of information held by the person listed."<sup>344</sup> Under this rule, the Supreme Court of Florida affirmed part of a district court of appeal decision which approved the refusal to order a party to answer an interrogatory which sought the identification of any witness who had given an opinion to the party or his attorney regarding the negligence or carelessness of that party.<sup>345</sup> However, the supreme court quashed a portion of the district court of appeal's opinion which held that a party could not be required to respond on behalf of his attorney to the extent of the party's knowledge in a nonprivileged area.<sup>346</sup>

In a case of first impression, the District Court of Appeal, Fourth

We hold that these grounds are insufficient to provide a basis for the court's order to produce defendant's work product.

*Dade County v. Monroe*, 237 So.2d 598, 601 (Fla. 3d Dist. 1970).

339. 247 So.2d 474 (Fla. 3d Dist. 1971).

340. Of particular interest in this case is the use of the word, "privileged." Strictly speaking the documents described in this case were in the work product category since they were prepared in anticipation of litigation. Privilege is a different category altogether. The language in the case ventures back and forth between work product concepts and privilege concepts. See *Urich, Evidence, 1969-71 Survey of Florida Law*, 26 U. MIAMI L. REV. 147, 163-65 (1971).

341. *Grand Union Co. v. Patrick*, 247 So.2d 474, 475 (Fla. 3d Dist. 1971).

342. See Section VII, A, *supra*.

343. See Section VII, A, 2, *supra*.

344. *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 113 (Fla. 1970).

345. *Id.*, *aff'g in part* 226 So.2d 871 (Fla. 3d Dist. 1969).

346. This holding was based upon *Dupree v. Better Way*, 86 So.2d 425 (Fla. 1956).

District, held that rule 1.340 does not warrant the designation of a specific officer to respond to an interrogatory on behalf of a corporate party. In *Ohio Realty Investment Co. v. Lawyers Title Insurance Corp.*,<sup>347</sup> the insurance company had filed interrogatories against Ohio Realty and had specified that the corporate president respond. Within the proper time period, Ohio Realty responded to the question through the offices of its Assistant Secretary. A motion to strike the pleadings was made and granted by the court on the grounds that Ohio Realty had failed to comply with an order of court by not having its president reply to the interrogatories. On certiorari, the Fourth District reversed.

In the absence of Florida precedent, the court looked to federal authority and quoted extensively from Professor Moore's treatise.<sup>348</sup> It was suggested that since the federal discovery rules, as amended in 1946, provided that a corporation was bound by the answers of its officers when questions were propounded to the corporation as a party, any justification in selecting a particular officer to respond to the interrogatories was no longer present.<sup>349</sup> Noting the similarity between the federal and Florida discovery rules, the court held that interrogatories can only be addressed to a party, and "[i]f [the] party is a corporation, it, rather than the propounder, is the sole judge of the officers or agents who shall furnish the information available to the interrogated corporate party."<sup>350</sup> The Fourth District went on to indicate, though, that "[i]f the testimony of any particular officer or agent is expressly desired by the propounder of the interrogatories, such can be obtained under Rule 1.310 (deposition

347. 244 So.2d 176 (Fla. 4th Dist. 1971) [Ohio Realty Investment Co. will be referred to in the text as Ohio Realty].

348. 4 J. MOORE, FEDERAL PRACTICE ¶ 33.07, at 33-47 (2d ed. 1970).

349. These considerations have led the courts to the position that the interrogatories must be served on the party, and that the party may select the officer or agent who is to answer them and verify the answers. Prior to the 1946 amendment, when ignorance of the officer selected to answer could be raised as an excuse for not answering an interrogatory, it could be argued that it was an important right of the interrogating party to choose the person who was to provide the answers. It is clear since the 1946 amendment, however, that whoever answers the interrogatories and verifies the answers on behalf of the corporation, the corporate party is the only one 'to meet the responsibility arising from such answers', and will be estopped to deny the authority of the person chosen by it to speak for it, or to deny the truthfulness of the answers. It is equally clear that whoever it is who answers the interrogatories, the answers must include whatever information is available to the party. This being true, it seems to make little or no difference to the interrogating party who verifies the answers and since there seems to be no reason why the interrogated party might not choose any agent it likes, the interpretation of who may be termed an "agent" under the Rule becomes completely unimportant. (Footnotes omitted)

*Id.*, quoted in *Ohio Realty Inv. Co. v. Lawyers Title Ins. Corp.*, 244 So.2d 176, 178 (Fla. 4th Dist. 1971).

350. *Ohio Realty Inv. Co. v. Lawyers Title Ins. Corp.*, 244 So.2d 176, 179 (Fla. 4th Dist. 1971).

There is no basis under Rule 1.340 to warrant the propounder of the interrogatory designating the particular officer or agent of the interrogated corporate party who must answer the interrogatories, and likewise there is no basis upon which the court may order that interrogatories propounded to a corporate party under Rule 1.340 be answered by a specific officer or agent designated by the court.

*Id.*

upon oral examination) or Rule 1.320 (depositions of witnesses upon written interrogatories).<sup>351</sup>

In addition, even though rule 1.560<sup>352</sup> allows the usage of discovery techniques "provided in these rules for taking depositions . . .," the Fourth District has recently held that "within our rules post judgment discovery may be obtained by deposition *or* by written interrogatories."<sup>353</sup> In so ruling, the court noted that rule 1.560 did not supplant regular discovery procedures available in aid of execution, but rather supplemented them. Adopting language of the United States Court of Appeals for the Fifth Circuit, it was suggested that the use of interrogatories was the most efficient and useful means for a judgment creditor to obtain necessary information in the case of a small judgment.<sup>354</sup>

## 2. DEPOSITIONS

There are several provisions in the Florida Rules of Civil Procedure which deal with the different types of depositions which may be employed,<sup>355</sup> their application,<sup>356</sup> and scope.<sup>357</sup>

Under some of those provisions, a court can modify the timing of the devices and make certain other adjustments in the interests of justice. While the trial court clearly "has the authority to regulate as well as to prevent the taking of depositions, . . . when the authority is exercised it should be only upon a showing of 'good cause' . . ."<sup>358</sup> In *Brennan v. Board of Public Instruction*,<sup>359</sup> the District Court of Appeal, Fourth District, found "good cause" lacking. The trial court had quashed the taking of a deposition which had been noticed at the time of the pretrial conference on the sole ground that the conference had been held and that there was insufficient time (seven days) remaining before the case went to trial. In reversing this order, the Fourth District indicated that the

351. *Id.*

352. Discovery in aid of execution. See note 353 *infra*.

353. *Wilde v. Wilde*, 237 So.2d 203, 205 (Fla. 4th Dist. 1970) (emphasis added). See *In re The Florida Bar: Rules of Civil Procedure*, 265 So.2d 21 (Fla. 1972) (rule amended in conformance with the holding in this case and broadened even further).

354. Limiting the manner in which post-judgment discovery may be obtained solely to depositions would preclude discovery in situations where, as here, the judgment is small. In actual practice the taking of testimony under the rules providing for depositions is costly, time consuming, and in some circumstances complicated . . . . Where the judgment is small the cost of discovery under these rules is prohibitive. Written interrogatories, on the other hand, are simple and inexpensive. They afford a direct, efficient, and accurate means by which the judgment creditor can obtain the desired information. For the holder of a small judgment, they are the only practical means of discovering the assets of judgment debtors . . . .

*Id.* at 205, *adopting the language of* *United States v. McWhirter*, 376 F.2d 102, 106 (5th Cir. 1967).

355. See FLA. R. CIV. P. 1.280, 1.290, 1.310, 1.320, 1.390.

356. See FLA. R. CIV. P. 1.280(c)-(g), 1.290(a)-(d), 1.300, 1.310, 1.320, 1.330, 1.390(b)(d).

357. See FLA. R. CIV. P. 1.280(b). See also Section VII, A, *supra*.

358. *Brennan v. Board of Pub. Instr.*, 244 So.2d 463, 464 (Fla. 4th Dist. 1971). See IV, C, *supra*.

359. *Brennan v. Board of Pub. Instr.*, 244 So.2d 463, 464 (Fla. 4th Dist. 1971).

holding of the pretrial conference could not be said to terminate the right of a party to notice or take depositions.<sup>360</sup>

The trial court has the power to alter the place where a deposition is taken. For instance, while a non-resident plaintiff who invokes the jurisdiction of the Florida courts must make himself available for discovery depositions in the place where the suit is pending, "a nonresident defendant, who does not seek affirmative relief in [a case], should not be required to travel into the state . . . , but should be deposed by interrogatories, or by oral examination in the state and place of his residence."<sup>361</sup>

Frequently, the question of where, when, and how a deposition may be used is advanced. Rule 1.330(d)(3) [formerly 1.280(d)(3) (1969)] specifies that a deposition may be used at trial if the deposed witness is at a distance greater than 100 miles from the situs of the trial. However, in *Thrifty Super Market, Inc. v. Kitchener*,<sup>362</sup> it was held that even though it was not shown on the record that one of a number of plaintiffs in an action was more than 100 miles away from the trial location at the time that his deposition was read into the record, an appellate court would not disapprove its inclusion in evidence where the defendant had not objected thereto at trial. In this same spirit, where the record clearly shows that a witness whose deposition is sought to be introduced is not within the 100 mile radius, an appellate court will probably not disturb the admission of the deposition.<sup>363</sup>

A court also has the discretionary power to admit a deposition into evidence which was taken in another case not before the court. In *Curtiss National Bank v. Street*,<sup>364</sup> it was held not to be an abuse of discretion for a trial judge to refuse to admit a deposition from another action into evidence in the case before him, especially in light of the fact that the deposition had only touched upon collateral issues in the other proceeding.

Exactly what constitutes an *expert* deposition is a sensitive question especially since such a deposition is admissible regardless of the place of the expert's residence.<sup>365</sup> If, however, the court finds that the personal appearance of an expert at trial is necessary to insure a fair and impartial trial, rule 1.390(b) provides that the expert may be compelled to personally attend. Obviously, since the expert will normally not be available at trial, it is extremely important that proper notice be afforded to alert opposing counsel of the special nature of the noticed deposition. In

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360. The court indicated that if indeed the defendant would be unable to adequately deal with the information arising out of the deposition, the proper remedy would be a continuance, not a denial of the deposition. See note 249 *supra* and accompanying text.

361. *Godshall v. Hessen*, 227 So.2d 506, 508 (Fla. 3d Dist. 1969), *cert. denied*, 237 So.2d 530 (Fla. 1970).

362. 227 So.2d 500 (Fla. 3d Dist. 1969).

363. See, e.g., *Vacation Prizes, Inc. v. City National Bank*, 227 So.2d 352 (Fla. 2d Dist. 1969).

364. 233 So.2d 453 (Fla. 3d Dist. 1970).

365. See FLA. R. CIV. P. 1.390.

*Haldane v. Hall*,<sup>366</sup> the question arose as to what precisely constituted adequate notice. In that case, the defendants had noticed for deposition the doctor who had treated the plaintiff for the injuries which were the basis for the plaintiff's claim. At trial, the plaintiff was allowed to read the deposition of the doctor without any showing of the physician's unavailability. The defendants objected strenuously on the grounds that the deposition was improperly admitted since it had not been noticed as an expert deposition under rule 1.390. After the return of an adverse verdict, the defendants moved for and were granted a new trial on the grounds that the deposition should not have been admitted into evidence.

On appeal, the District Court of Appeal, Fourth District, looked to the rule 1.390 requirement of "reasonable notice" and a decision of the District Court of Appeal, Second District, *Bondy v. West*,<sup>367</sup> which had interpreted "reasonable notice" to require a specification in the deposition notice that it was being taken pursuant to that specific rule. According to *Bondy*, "if the notice omits this reference . . . the deposition cannot be used in the manner contemplated by Rule 1.390."<sup>368</sup> The Fourth District rejected the *Bondy* requirement and held that "'reasonable notice' within the meaning of Rule 1.390(b) is any notice which clearly indicates that the deponent is an 'expert witness' as defined in Section (a) of the rule."<sup>369</sup> Accordingly, when parties are forewarned in that fashion, "they are put on notice by the Rules of Civil Procedure of all possible uses of the deposition and can govern themselves accordingly."<sup>370</sup> The court concluded, then, that at the time notice was served upon the doctor, all parties had adequate knowledge and notice that he was an expert and that his deposition was an expert deposition. On writ of certiorari to the Supreme Court of Florida, the *Haldane* test was expressly approved and the *Bondy* test expressly rejected.<sup>371</sup>

### 3. PRODUCTION OF DOCUMENTS

Upon notice and without leave of court, a party may examine documents, books, or things owned or controlled by an adverse party within the scope of rule 1.280(b).<sup>372</sup> There is, of course, as with all discovery procedures, an implied condition of reasonableness in materials sought to be produced. In *City of Miami v. Florida Public Service Comm'n*,<sup>373</sup> in a 3-1-3 decision, the Supreme Court of Florida affirmed a ruling by the Public Service Commission refusing the City of Miami's motion to produce all of a power company's books and records in a proceeding involving

366. 234 So.2d 739 (Fla. 4th Dist. 1970) [hereinafter cited as *Haldane*].

367. 219 So.2d 117 (Fla. 2d Dist. 1969) [hereinafter cited as *Bondy*].

368. *Haldane v. Hall*, 234 So.2d 739, 740 (Fla. 4th Dist. 1970).

369. *Id.*

370. *Id.*

371. *Hall v. Haldane*, 243 So.2d 571 (Fla. 1971). See *In re The Florida Bar: Rules of Civil Procedure*, 265 So.2d 21, 38-39 (Fla. 1972).

372. See Fla. R. Civ. P. 1.350.

373. 226 So.2d 217 (Fla. 1969) [hereinafter cited as *Miami*].



proposed utility rate increases. The Commission had held that its discovery provisions were to be interpreted and used in the same fashion as rule 1.350, and that

[t]he burden rests upon the party desiring to utilize the rule in that he must show that those documents and papers he wishes to be produced for inspection are relevant to the proceeding, and not merely for the purpose of a 'fishing expedition'; that good cause for producing is shown; and, that the documents and papers are specified with reasonable particularity. Unless the movant complies with *all* of the three requirements, the motion should be denied.<sup>374</sup>

Applying those criteria to the matter before them, the administrative body found that the materials sought by the city were too broad and that information and data sought to be discovered must be specific and not general. The supreme court affirmed the Commission's ruling and added that "[t]o permit examination of all records of income and expenditure would unreasonably interfere with the operation of the Power Company. Numerous demands for large scale examination of this type would make it difficult to conduct ordinary electric service."<sup>375</sup>

One of the grounds stated by the Florida Public Service Commission for rejecting the city's motion to produce in *Miami* was the lack of specificity in describing the documents sought. This objection was also raised in *Dade County v. Monroe*,<sup>376</sup> where certain accident reports were sought to be produced in a wrongful death action. Although certain documents were held to be inaccessible because they constituted work product, the court rejected the contention that requests which sought nonprivileged accident reports, voice recordings, and written statements in connection with a specific accident were so broad as to not sufficiently describe the documents.

Two cases were decided during the survey period which dealt with the previously required showing of "good cause." However, the cases came to contrary conclusions. In *Grand Union Co. v. Patrick*,<sup>377</sup> the District Court of Appeal, Third District, held that where a trial record did not contain a manifest showing of good cause to justify the granting of a motion to produce certain documents, reference to the pleadings which would allegedly demonstrate good cause was not sufficient to fulfill the requisites of the rule. The court felt that the requisite showing was of a mandatory nature and had to be clearly demonstrated.<sup>378</sup> However, in

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374. *Id.* at 218, quoting Florida Pub. Service Comm'n. Order No. 4487 (December 31, 1968). Good cause is no longer required to be shown. See FLA. R. CIV. P. 1.350; note 381 *infra* and accompanying text.

375. *Id.* at 219.

376. 237 So.2d 598 (Fla. 3d Dist. 1970). See Section VII, A, 2, and notes 335-38 *supra* and accompanying text.

377. 247 So.2d 474 (Fla. 3d Dist. 1971).

378. It is argued on behalf of the respondent that the failure of the motion to state

*Haynes v. International Harvester Co.*,<sup>379</sup> the District Court of Appeal, Second District, presumed a finding of good cause and a showing of same when the record had been silent on the point. The court stated:

The petitioners' motion to produce . . . requested the respondents to produce other documents, which request was granted in part. *Therefore, we must assume* that the trial court was satisfied that the petitioners' motion to produce met the requirements of a showing of good cause as required by Rule 1.350 . . .<sup>380</sup>

The point has been mooted, however, before it was ever resolved by the supreme court since that body has promulgated new discovery rule amendments effective January 1, 1973.<sup>381</sup>

In addition to the now defunct "good cause" ruling, the *Haynes* court also ruled that documents prepared in the ordinary course of business were discoverable and could not be hidden behind a work product mantle. In *Haynes*, forms submitted by a truck dealer for a warranty claim were sought by a party in litigation which stemmed partly from repairs made to the vehicle. The Second District held that the form was an ordinary business record and was "in no way a document, memoranda, report, or statement made in anticipation of a claim. It [was] . . . a report solely for the benefit of the dealer . . . so that he [might] . . . receive credit . . . under the warranty."<sup>382</sup> Because of allegations contained in the appellee's brief relating to notations made in anticipation of litigation on that specific form, the appellate court remanded the matter to the trial court for examination of the forms in their entirety since the record on appeal did not contain the disputed documents.

#### 4. BLOOD TESTS

Rule 1.360 provides that upon motion and the demonstration of good cause, a court may issue an order compelling a party to submit to a physical or mental examination prior to trial if the physical or mental condition of a party is at issue. The rule provides elaborate safeguards for the examined party including the right to a full report from the examiner upon demand. It also provides that the party requesting the examination is entitled to any other reports prepared for the examined party if demand for and delivery of the first report is made.<sup>383</sup>

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or show good cause was not material because reference to the pleadings should be sufficient to disclose a need or cause therefor. That argument is unsound. The requirement in the rule that such a motion to produce should show good cause is clear and appears mandatory. The motion in this case failed to conform to the requirement of the rule in that respect.

*Id.* at 475.

379. 227 So.2d 51 (Fla. 2d Dist. 1969) [hereinafter cited as *Haynes*].

380. *Id.* at 52 (emphasis added).

381. See *In re The Florida Bar: Rules of Civil Procedure*, 265 So.2d 21 (Fla. 1972). Under those provisions, "good cause" is no longer required. See also FED. R. CIV. P. 34, the precursor of the new Florida rule.

382. *Haynes v. International Harvester Co.*, 227 So.2d 51, 52 (Fla. 3d Dist. 1969).

383. See FLA. R. CIV. P. 1.360(b).

In *In re Adoption of Samples*,<sup>384</sup> the adoption proceedings of a young girl were under review. The child had been born while her mother and her mother's first husband were still married. Subsequently, the two were divorced, and the mother married her second husband, but this marriage also ended in divorce. The second spouse filed for adoption of the child claiming that he was the natural father, and that this fact was sufficient to rebut the presumption that the first husband was the legal and natural father. The child's mother filed a consent to the adoption and alleged in that document that the second husband was indeed the natural parent. On his motion, the court ordered that all three "parents" submit to blood tests; the first husband appealed. The District Court of Appeal, Second District, held that "the court has wide discretion in determining these matters and particularly in determining the best interests of the child." The Second District then concluded that if the judge "*in his discretion* believes a blood test to be of importance in determining the paternity and therefore the best interest of this child [the] court will not disturb the order appealed."<sup>385</sup>

### C. Refusal to Make Discovery

Stiff sanctions are built into the discovery provisions of the rules for failure to comply with their dictates. These sanctions include the striking of pleadings, a party's admission of certain issues for purposes of the action, dismissal of the action, or entry of a default judgment<sup>386</sup> and contempt citations. In addition, if less severe penalties are found to be in order, certain costs and attorney's fees may be awarded.<sup>387</sup>

Regardless of the gravity of the sanction undertaken, a court has wide discretion in fixing penalties and sanctions,<sup>388</sup> however, the old rule did not operate unless a *refusal* to comply with discovery provisions had occurred. This was not a waivable condition as is evident from the District Court of Appeal, Fourth District, opinion in *Ohio Realty Investment Co. v. Lawyers Title Insurance Corp.*<sup>389</sup> There, citing an earlier case decided by the court,<sup>390</sup> the Fourth District stated that "in the absence of an express finding by the court that the . . . failure to comply . . . was a refusal,

384. 226 So.2d 135 (Fla. 2d Dist. 1969).

385. *Id.* at 136 (emphasis added).

386. FLA. R. CIV. P. 1.380(b), (d). See *Riley v. Gustinger*, 235 So.2d 364 (Fla. 3d Dist. 1970), where the court held that a trial judge was justified under rule 1.380(b)(2)(iii) (1969) in striking an answer and entering a default judgment for failure to give fuller answers to interrogatories after two extensions of time had been granted.

387. FLA. R. CIV. P. 1.380(a)(4), (b)(2)(F), (c), (d).

388. When a plaintiff is given time by order of the court within which to abide by the rule or suffer a dismissal, the only question for review by an appellate court upon an appeal from an order dismissing the cause with prejudice would be upon the question of an abuse of discretion by the trial court in the making of the order directing the performance of the act within the time limit.

*Webber v. Brickley*, 239 So.2d 633, 634 (Fla. 3d Dist. 1970), quoting *Rashard v. Cappiali*, 171 So.2d 581, 583 (Fla. 3d Dist. 1965).

389. 244 So.2d 176 (Fla. 4th Dist. 1971). See notes 347-51 *supra* and accompanying text.

390. *Swindle v. Reid*, 242 So.2d 751 (Fla. 4th Dist. 1970).

or in the absence of the record conclusively revealing such, it was an abuse of discretion . . .<sup>391</sup> for the court to dismiss the action with prejudice in the earlier case and to strike pleadings and enter a default judgment in the case before it. In the earlier decision, *Swindle v. Reid*,<sup>392</sup> the court had indicated that sanctions such as dismissal of an action with prejudice "is a drastic punishment and should not be invoked except in those cases where the conduct of the party shows a deliberate and contumacious disregard of the court's authority."<sup>393</sup>

The *Swindle* court had before it a case in which a grantor and chief beneficiary of a trust brought suit to enjoin the collection of intangible taxes on the grounds that the situs of the trust's corpus was in Oklahoma. The defendant tax assessor moved for and was granted extensive motions for the production of documents. While the grantor was able to produce some of the documents, others were allegedly in the custody of Oklahoma trustees who provided depositions to the court setting forth their refusal to provide the documents. On defendant's motion, the trial court dismissed the suit with prejudice for failure to comply with discovery orders, and an appeal was taken. The Fourth District noted that the trial court found that the grantor had an "insufficient excuse for her failure to comply," but emphatically stated that this did not constitute a refusal, "a distinction which [the court felt] to be significant."<sup>394</sup> The court did stress, however, that it was not holding that the grantor's action failed to constitute a refusal, but indicated that the record did not demonstrate a refusal. Consequently, the court reversed the dismissal and remanded the suit.<sup>395</sup>

In *Canella v. Bryant*,<sup>396</sup> recent house-buyers brought suit for misrepresentation against the real estate broker through whom the house had been purchased and the multiple-listing service which had advertised the home. The broker filed a motion to dismiss and scheduled the plaintiffs for depositions on three weeks' notice. On the day prior to the deposition, the plaintiffs' attorney telephoned the defendant's attorney and informed him that as a result of last minute filings in a previously scheduled hearing (which otherwise would have concluded well in advance of the scheduled hour of the depositions), he would be unable to attend at the prescribed time and asked that the depositions be rescheduled. The defendant's attorney refused, and the plaintiffs' attorney subsequently

391. *Ohio Realty Inv. Co. v. Lawyers Title Ins. Corp.*, 244 So.2d 176, 179 (Fla. 4th Dist. 1971).

392. 242 So.2d 751 (Fla. 4th Dist. 1970) [hereinafter cited as *Swindle*].

393. *Id.* at 753.

394. *Id.*

395. The trial court clearly has the authority under Rule 1.380 R.C.P. to dismiss a complaint as a sanction against the plaintiff for a failure to make discovery, and the dismissal may be with prejudice where the plaintiff refuses to obey an order of court . . . . We merely hold that in the absence of either an expressed finding to that effect or the record conclusively revealing that there was a refusal to obey the order, it was an abuse of discretion to dismiss the complaint with prejudice for plaintiff's [grantor] failure to comply with the order.

*Id.*

396. 235 So.2d 328 (Fla. 4th Dist. 1970) [hereinafter cited as *Canella*].

was unable to secure a continuance from the court because of the lateness of the hour. On the following day, at the appointed hour, the defendant's attorney telephoned plaintiffs' counsel at which time a second request for a rescheduling was offered and rejected. The defendant's attorney then moved to strike and dismiss the complaint and for the entry of default judgment against the plaintiffs "for their willful failure to appear at the taking of the depositions."<sup>397</sup> The motion was granted and judgment entered; the plaintiffs appealed.

In a decision which cut squarely to the heart of the theory of discovery sanctions, the District Court of Appeal, Fourth District, reversed the trial court and repudiated its holding. The court looked to the central question, whether the plaintiffs' failure to attend was *willful*, and found that it was not. In so holding, the court reflected the current liberalized approach towards discovery sanctions in both federal and Florida courts.<sup>398</sup>

From the tenor of these decisions it is quite apparent that severe sanctions may be levied under certain conditions. Often, though, when the most severe penalties are considered, questions arise as to exactly which sanctions should be levied. For instance, in *Canella*, the court held that the trial judge had improperly entered a default judgment against the plaintiffs because "[b]y the plain language of the rule [1.380(d)], it is obvious that the portion of the rule permitting entry of judgment by default applies only against the defendant and not against the plaintiff."<sup>399</sup> The court reasoned that the only available penalties to be employed against a plaintiff were to strike the pleadings or dismiss the action or any part thereof. This was not, however, the unanimous holding of the court. In an opinion concurring with the result, Judge Walden took exception to this last holding and stated that a default judgment could be entered against a plaintiff. In so stating, the judge compared the provisions of rule 1.380(d) with rule 37(d) of the Federal Rules of Civil Procedure (after which the former rule was modeled) and concluded that a default judgment could be properly entered against either side under appropriate circumstances.

The question of which rule controls the imposition of discovery sanctions is a question of paramount importance. There are two rules which could conceivably be involved, rule 1.380 (which explicitly deals with

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397. *Id.* at 330.

398. In strong dictum of the majority opinion, Chief Judge Cross criticized the conduct of the defendant's attorney and the lower court.

[T]he rules of civil procedure were not designed to be used in a manner to cause oppression or harassment to the parties of a lawsuit, but should be liberally construed to effectuate the intended purposes of allowing a complainant to state his cause and facilitate an expeditious trial on the merits. When a strict enforcement of the letter of practice rules tends to prevent or jeopardize administration of justice, the rules should yield to a higher purpose. We expect trial judges to oversee the using of the rules to the end that they shall be tools for obtaining justice as well as a speedy determination of causes.

*Id.* at 332.

399. *Id.* at 331.

refusals to make discovery) and rule 1.420 (which governs involuntary dismissals). In the Committee Note which accompanies rule 1.380, it is clearly stated that "RCP 1.420 and 1.500(a) and (b) do not apply to such a refusal," but two recent decisions, *Webber v. Brickley*<sup>400</sup> and *Canella*,<sup>401</sup> have suggested a contrary conclusion. In *Webber*, a per curiam opinion, the District Court of Appeal, Third District, noted that an appellant's grounds for appeal were insufficient because a survey of the record indicated that the conduct of a rehearing fulfilled "the purpose of the notice provision of rule 1.420 (b) . . ."<sup>402</sup> This is an unusual reference to rule 1.420(b) since rule 1.380 clearly contains sanction powers within its provisions with the same degree of severity. This same course, though, was followed in *Canella*.<sup>403</sup> The apparent reliance on rule 1.420(b) is not only contrary to the intent of the rules,<sup>404</sup> but is also redundant since that rule provides for involuntary dismissal "for failure of an adverse party to comply with these rules . . ."<sup>405</sup> Thus, the very language of rule 1.420(b) could well justify the sanction of an involuntary dismissal even if rule 1.380 had not been enacted.<sup>406</sup>

## VIII. DISMISSAL

### A. Voluntary

Generally, a plaintiff may dismiss an action once *without* a court order if a notice of dismissal is filed before a hearing on a motion for summary judgment, or in the event that no motion is heard or such a motion is un-

400. 239 So.2d 633 (Fla. 3d Dist. 1970) [hereinafter cited as *Webber*].

401. 235 So.2d 328 (Fla. 4th Dist. 1970). See notes 396-98 *supra* and accompanying text.

402. *Webber v. Brickley*, 239 So.2d 633, 634 (Fla. 3d Dist. 1970).

403. Since the dismissal referred to in Rule 1.380(d) would be an involuntary dismissal as opposed to a voluntary dismissal, it is necessary to review Rule 1.420(b), which concerns itself with involuntary dismissal and provides in part as follows:

*Involuntary Dismissal.* Any party may move for dismissal of an action or of any claim against him for failure of an adverse party to comply with these rules or any order of court. \* \* \*

It should be noticed that Rule 1.420(b) permits involuntary dismissal upon motion for two separate reasons: (1) failure of an adverse party to comply with these rules, or (2) failure of an adverse party to comply with any order of court.

In the instant case, the plaintiffs did not fail to comply with any order of court requiring their deposition as the defendant sought no order of court compelling depositions of the plaintiffs. Defendant merely after scheduling the depositions of plaintiffs for the *first time* and upon plaintiffs' failure to attend that deposition, moved the court to strike and dismiss.

*Canella v. Bryant*, 235 So.2d 328, 332 (Fla. 4th Dist. 1970) (emphasis supplied by court).

404. See discussion of Committee Note accompanying rule 1.380 *supra* (pre-1972).

405. FLA. R. CIV. P. 1.420(b).

406. *Canella* and *Webber* take one other tack which seems inconsistent with the express language of the rules. Both cases hold that a dismissal with prejudice is allowable in the court's discretion, but that such a dismissal may only be granted for violation of an order of court. Implicit in this reasoning is that a court could not dismiss an action with prejudice if a party grossly ignored the time periods for answering interrogatories unless the opposing party had moved for an order to compel discovery (unless, of course, one year has elapsed and the court dismissed pursuant to rule 1.420(e)). This interpretation is in opposition to the clear language of both rule 1.380 and rule 1.420(b) and is radically opposed to the spirit and intent of the liberalized discovery rules which are designed to operate extrajudicially.

successful, at any time before the jury retires (in a jury action) or before the case is submitted to the court (in a nonjury case).<sup>407</sup> At other times leave of court is required, but if a counterclaim is filed before dismissal notice is served, the court may not dismiss the case unless the counterclaim has independent jurisdictional status.<sup>408</sup> Under either method, dismissal is without prejudice unless the court so orders or the parties so stipulate according to rule 1.420.

The right to a dismissal without prejudice under rule 1.420(a) (notice dismissal) is absolute and may not be abridged by a court. In *Gate City, Inc. v. Arnold Construction Co.*,<sup>409</sup> the District Court of Appeal, Fourth District, reversed the entry of summary final judgment against a plaintiff on the grounds that the trial court lost jurisdiction to enter judgment after the plaintiff had filed a notice of dismissal, even though the defendant had filed motions for dismissal and summary judgment before notice was filed. The court held that a plaintiff had an absolute right to dismissal without prejudice as long as notice was filed before the hearing of a motion for summary judgment or dismissal, regardless of the date on which those motions were filed. In another case, *Briner v. Gilmore*,<sup>410</sup> the plaintiff had filed suit for reformation and foreclosure of a mortgage on real property. The action was dismissed by the trial court upon the defendants' motion, which set forth the statement of another judge outlining the details of a case before him which involved the same parties and the same claim. Noting that the first suit was terminated by the voluntary dismissal of the plaintiff pursuant to rule 1.420(a), the District Court of Appeal, Second District, reversed and held that "a voluntary dismissal is without prejudice and . . . the plaintiff has an absolute right to one such dismissal."<sup>411</sup>

There is, however, one significant exception to the complete determination by a plaintiff of the timing of a voluntary dismissal, that is, when "property has been seized or is in the custody of the court . . ."<sup>412</sup> For instance, a condemnor who has commenced eminent domain proceedings may not voluntarily dismiss the case pursuant to rule 1.420(a)(1). In *O'Sullivan v. City of Deerfield Beach*,<sup>413</sup> the city had deposited monies into the registry of the court and commenced condemnation proceedings as prescribed by Florida Statutes ch. 74 (1967).<sup>414</sup> Later, the city filed a voluntary dismissal, and an appeal was taken. On review, the District Court of Appeal, Fourth District, reversed and held that the city could

407. FLA. R. CIV. P. 1.420(a)(1).

408. FLA. R. CIV. P. 1.420(a)(2).

409. 243 So.2d 637 (Fla. 4th Dist. 1971).

410. 229 So.2d 874 (Fla. 2d Dist. 1969).

411. *Id.* at 875.

412. FLA. R. CIV. P. 1.420(a)(1).

413. 232 So.2d 33 (Fla. 4th Dist. 1970).

414. See FLA. STAT. §§ 74.041, 74.051, 74.061, 74.071 (1967). These statutes have remained the same in the last official (1969) compilation of the Florida Statutes with the exception of two provisions which were amended in 1970 which do not effect holding in this case. See FLA. STAT. § 74.041 (Supp. 1970), amended by Fla. Laws 1970, Ch. 70-286; FLA. STAT. § 74.051 (Supp. 1970), amended by Fla. Laws 1971, 70-365, § 1.

not voluntarily dismiss the suit because of the property exclusion provision of rule 1.420(a)(1) and the express statutory language of chapter 74 which provided that title to all property involved in condemnation proceedings became immediately transferred and vested in the condemnor upon deposit of funds in the court registry.<sup>415</sup> The court barred the dismissal because it left "important matters in limbo," such as the fixing of damages, the status of the seized land, the title of that land, and the deposit held by the court.<sup>416</sup> This holding was seen by the court to be a logical adoption of dicta of Justice Terrell of the Supreme Court of Florida in *Conner v. State Road Dept.*<sup>417</sup> The Fourth District also held that the action could be dismissed pursuant to rule 1.420(a)(2) if the parties could be returned to the status quo "upon such terms and conditions as the court deems proper . . .," if the condemnor wished to dismiss, and the condemnee wished to recover title.<sup>418</sup>

A conflict has arisen, though, regarding the precise time that a court relinquishes jurisdiction in an action which has been voluntarily dismissed pursuant to rule 1.420. The District Court of Appeal, Fourth District, in *Rich Motors, Inc. v. Loyd Cole Produce Express, Inc.*,<sup>419</sup> held that a trial court loses jurisdiction as soon as a voluntary dismissal is filed. In that case, the plaintiff had taken a voluntary dismissal when it appeared that the judge was about to deny him the admission of critical evidence. Subsequently, the plaintiff filed a petition for review stating that his voluntary "non-suit" was tantamount to an involuntary dismissal and moved for a rehearing on the grounds of excusable neglect in the untimely filing of the petition. The rehearing was granted, and the cause reinstated. The Fourth District reversed and stated that non-suits no longer existed in Florida even though under older procedural rules "a non-suit made compulsory

415. FLA. STAT. § 74.061(1) (1967) provides:

Immediately upon the making of the deposit, the title or interest specified in the petition shall vest in the petitioner, and the said lands shall be deemed to be condemned and taken for the use of the petitioner, and the right to compensation for the same shall vest in the persons entitled thereto. Compensation shall be determined in accordance with the provisions of chapter 73, except that interest shall be allowed at the rate of six per cent per annum from the date of surrender of possession to the date of payment on the amount that the verdict exceeds the estimate of value set forth in the declaration of taking.

416. *O'Sullivan v. City of Deerfield Beach*, 232 So.2d 33, 34-35 (Fla. 4th Dist. 1970).

417. 66 So.2d 257 (Fla. 1953).

[I]t seems to be the legislative intendment that the making of the deposit would absolutely seal the transfer of title and right of possession in the condemnor to the end that it could not be undone by dismissal. This view is further buttressed by the comment of Mr. Justice Terrell by way of obiter dictum in the case of *Conner v. State Road Dept. of Florida*, Fla. 1953, 66 So.2d 257:

"This Court is committed to the doctrine that proceedings for condemnation of private property may be dismissed by the condemnors at any time.

We construe 'any time' to mean that time before which compensation is made or actual possession of the property is taken by the condemnors."

*O'Sullivan v. City of Deerfield Beach*, 232 So.2d 33, 35 (Fla. 4th Dist. 1970).

418. *Id.* at 36. In the case before the court, though, the condemnee did not wish to return to the status quo. Consequently, the court vacated the dismissal and remanded the action for trial.

419. 244 So.2d 526 (Fla. 4th Dist. 1970).



because of an adverse ruling which was preclusive of recovery was considered to be an involuntary non-suit, since at that point the plaintiff had no absolute right to a non-suit.<sup>420</sup> The court then held that the plaintiff had filed a voluntary and not an involuntary dismissal which had ousted the court of jurisdiction by his own act of filing the notice of dismissal.

[The filing of a voluntary dismissal] is an absolute right of the plaintiff without order of court, which gives to the plaintiff absolute control over continuation of the litigation. . . . Since a trial court has no discretion under F.R.C.P. 1.420(a)(1)(i) in granting or denying a voluntary dismissal by a plaintiff, it follows, then, that a trial court has no authority to review a voluntary dismissal. A voluntary dismissal . . . serves to terminate the action and to divest the court of jurisdiction.<sup>421</sup>

However, in *Cooper v. Carroll*,<sup>422</sup> the District Court of Appeal, Third District, came to a contrary conclusion. There, a plaintiff filed a voluntary dismissal against a number of defendants and subsequently moved the court pursuant to rule 1.540 to grant relief from the dismissal on the grounds that he had mistakenly dismissed all defendants when he only intended to dismiss one. The court granted the motion, reinstated the action as to all but one of the defendants, and one of the defendants appealed. The appellant contended that the court had lost jurisdiction at the moment that the plaintiff filed his notice of dismissal, and that any actions taken by the court after that point were improper. The appellant also contended that rule 1.540 did not apply to voluntary dismissals. The Third District disagreed and held that the voluntary dismissal of an action by a plaintiff "provides a short cut, or expeditious manner of disposition of a cause which otherwise would be accomplished by order of the court on motion of the party." The court continued: "Such action in the cause, equivalent to dismissal by court order, constitutes a 'proceeding' therein from the effect of which the party involved can be granted relief by the trial court under Rule 1.540(b) in an appropriate instance."<sup>423</sup> Consequently, there appears to be a conflict between the Fourth District and the Third District on this question.<sup>424</sup>

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420. *Id.* at 527.

421. *Id.* at 527-28.

422. 239 So.2d 511 (Fla. 3d Dist. 1970).

423. *Id.* at 513. The court also held that rule 1.420 did not authorize the dismissal of an action against one of a number of defendants, but that a dismissal would have to operate against all defendants or none of them. However, the Third District held that the court by order could dismiss the complaint against some but not all defendants under rule 1.250, and that "[t]he acceptance by the trial court of the proffered amended notice as a basis for dismissal as to [one defendant] made the dismissal as to that party one which was authorized by the court's order." *Id.* See notes 598-603 *infra* and accompanying text.

424. In the authors' opinion, the Fourth District holding is more persuasive than that of the Third District on this particular point. When a plaintiff files a notice of dismissal pursuant to rule 1.420(a), the action comes to an end; a defendant is precluded from reaching a judgment on the merits even if a motion has been filed (but not heard). To hold that a plaintiff may reopen an action upon whim would render an inequality of justice which certainly could not be consistent with the spirit and intent of the rules.

The avenue of voluntary dismissal may be a safe way out of unsuccessful litigation, but it is not necessarily a "free trip." Rule 1.420(d) provides that costs may be assessed at the time judgment is entered or at such time that a plaintiff files a second action with the same claim and parties. In *Keener v. Dunning*,<sup>425</sup> a defendant's motion for the assessment of costs for depositions of medical experts and copies of documents and reports at the time of a plaintiff's voluntary dismissal was denied. The trial court noted that there was no way of knowing at the preliminary stages of the first proceeding whether such costs would have been allowed in a regular action. Reasoning that the action had been refiled and that the proper course of action was to wait and see what occurred during the course of that second trial, the judge refused to assess costs. On appeal, the District Court of Appeal, Fourth District, reversed, noting that while the assessment of costs was a matter which largely rested in the discretion of a trial judge, costs "incurred in the taking of depositions and the acquisition of documentary evidence . . . should not be disallowed merely because the use of the depositions and the documentary evidence was obviated by a voluntary dismissal."<sup>426</sup> The trial judge was ordered on remand to examine each requested cost and rule on it individually "depending upon his interpretation of the reasonableness of its amount and the necessity for incurring it."

Where a cause is voluntarily dismissed by a plaintiff under Rule 1.420(a) (1), F.R.C.P., and a motion is filed in the cause to tax costs, the trial judge should specifically rule in that cause on the taxability of each cost item to be taxed. Thereafter, the trial judge should enter a judgment assessing against the dismissing party those items of costs determined to be taxable. He has, however, no authority to defer a ruling on costs pending the outcome of other actions.<sup>427</sup>

### B. *Involuntary*

For failure to comply with the rules of procedure or an order of court, an involuntary dismissal may be entered against a plaintiff pursuant to rule 1.420(b). In addition, after a party seeking affirmative relief has presented his evidence in a non-jury trial, the opposing party may move for an involuntary dismissal which will not prejudice that party's right to present his own case.<sup>428</sup> An involuntary dismissal of the second variety is tantamount to a directed verdict.<sup>429</sup> Generally, notice of a hearing of a

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425. 238 So.2d 113 (Fla. 4th Dist. 1970).

426. *Id.* at 114.

427. *Id.*

428. FLA. R. CIV. P. 1.420(b).

429. In non-jury trials, a motion for directed verdict is tantamount to a motion for involuntary dismissal under Rule 1.420(b), 30 F.S.A. Thus, the trial judge as [a] trier of fact [is] governed by different criteria and [is] entitled to weigh the evidence, resolve conflicts and pass upon the credibility of witnesses. If in this light the court finds the plaintiff's evidence is insufficient to merit judgment, the court may enter judgment at that point for the defendant.

*Tillman v. Baskin*, 242 So.2d 748, 748-49 (Fla. 4th Dist. 1971). This has been and continues

motion for involuntary dismissal must be served a reasonable time prior to the hearing,<sup>430</sup> but in *Allstate Insurance Co. v. Caos*,<sup>431</sup> an intermediate Florida appellate court held that an ore tenus motion for involuntary dismissal at trial for failure to provide a witness list was properly granted.

When the failure to comply with a court order is involved, the trial court is given wide discretion in granting a dismissal which will only be overturned when it is shown that the court order had been improper. Such dismissals are generally with prejudice and operate as an adjudication on the merits.<sup>432</sup> In *Lasley v. Cushing*,<sup>433</sup> the court distinguished between the severity of penalties for failure to comply with the rules and failure to comply with an order of court. It held that when a court order was not complied with and an involuntary dismissal was entered, the only question left for review was "whether the trial court's discretion was abused by the entry of the dismissal order."<sup>434</sup> In that case, a plaintiff had failed for 13 months to comply with a court order prescribing the time for amending a com-

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to be the rule in the federal courts also. See 5 J. MOORE, FEDERAL PRACTICE ¶ 41.13[4] (2d ed. 1971).

However, subsequent to the period covered by this survey, the Supreme Court of Florida reversed *Tillman* [260 So.2d 509 (Fla. 1972)] and abolished the distinction between an involuntary dismissal test in non-jury trials and the directed verdict test in jury actions. The supreme court noted that in so holding it was rejecting both the federal standard and the rule of two of the four district courts of appeal in Florida. See *Gibson v. Gibson*, 180 So.2d 388 (Fla. 1st Dist. 1965); *Tampa Wholesale Co. v. Foodtown, U.S.A., Inc.*, 166 So.2d 711 (Fla. 2d Dist. 1965). *Contra* *Wayjay Bakery, Inc. v. Carolina Freight Carriers Corp.*, 177 So.2d 544 (Fla. 3d Dist. 1965). In conclusion, the court held:

There is nothing in Rule 1.420(b) making mandatory a weighing of the facts before the end of all the testimony. Fairness and justice demand that this not be done where the plaintiff has presented a prima facie case in his favor. . . . It is inconceivable that a trial judge can fairly find for a defendant after hearing nothing more than testimony from a plaintiff establishing a prima facie case in that plaintiff's favor. When a prima facie case is made by plaintiff, fairness would appear to require that the trial judge weigh it in light of the strength or weakness of the defendant's defense evidence, if any, as in the case of a jury trial. We hold that a trial judge cannot weigh evidence when ruling on a defendant's Rule 1.420(b) F.R.C.P. motion for involuntary dismissal following the presentation of a prima facie case by a plaintiff.

*Tillman v. Baskin*, 260 So.2d 509, 511-12 (Fla. 1972), *rev'g* 242 So.2d 748 (Fla. 4th Dist. 1971).

430. FLA. R. CIV. P. 1.090(d), 1.420(b).

431. 237 So.2d 53 (Fla. 3d Dist. 1970). The defendant, who was also a counterclaimant in that action, filed an oral motion (without notice) at trial to dismiss the action for failure of the plaintiff to provide a witness list to the defendant. The court noted that the defendant counterclaimant had also failed to supply such a list and dismissed both actions with prejudice. This final order was later amended to a dismissal without prejudice. The District Court of Appeal, Third District, affirmed the trial court's action and noted with approval language contained in *Coggan v. Coggan*, 213 So.2d 902 (Fla. 2d Dist. 1968) which stated that regardless of the time requirements of the rules, as long as counsel for both parties were present, there was no surprise, the motion and order were reduced to writing, and the motion favored a just and expeditious disposition of the case, the dismissal would be upheld. *Allstate Ins. Co. v. Caos*, 237 So.2d 53, 53-54 (Fla. 3d Dist. 1970), *citing* *Coggan v. Coggan*, 213 So.2d 902, 903 (Fla. 2d Dist. 1968).

432. FLA. R. CIV. P. 1.420(b). See *E & E Electric Cont., Inc. v. Singer*, 236 So.2d 195 (Fla. 3d Dist. 1970), *cert. dismissed*, 239 So.2d 827 (Fla. 1970), where the court held that the failure to amend a complaint within the time prescribed by court order justified a dismissal with prejudice. See notes 171-74 *supra* and accompanying text.

433. 244 So.2d 770 (Fla. 1st Dist. 1971).

434. *Id.* at 772.

plaint. The court noted, though, that “[e]ach case of this sort must be viewed in light of its own peculiar circumstances, including the extent of the tardiness involved in compliance with a court order in determining whether an abuse of discretion occurred.”<sup>435</sup>

### C. Failure to Prosecute

If in any action no activity has taken place for one year, any interested person or the court may move to dismiss the action for failure to prosecute. Unless the offending party shows good cause in writing at least five days before a hearing on the motion, the case will be dismissed with prejudice.<sup>436</sup>

One of the most frequently litigated points is the determination of what exactly constitutes “activity” so as to forestall dismissal and toll the one-year time period. Rule 1.420(e) states that pleadings and court orders constitute “action,” and some recent cases expand on the category. In *Whitney v. Whitney*,<sup>437</sup> two executors became embroiled in a dispute which led to the courts. Shortly before trial, one executor moved for and was granted a continuance to acquire new evidence. A year and one day later, the other executor was granted a dismissal for failure of the plaintiff executor to prosecute.

On appeal, the District Court of Appeal, Second District, looked to the record which demonstrated a number of contacts between counsel for both parties which resulted in the imminent transfer of certain documents (check stubs) to the plaintiff executor, the actual delivery of which was cut off by the court’s dismissal order. The Second District held these communications between the two lawyers to be “activity” under the rule’s “or otherwise” clause.<sup>438</sup> In handing down its decision, the court enumerated the following events which have been held to constitute sufficient “activity” to forestall dismissal: a verbal request made to a trial court clerk asking that a trial be docketed,<sup>439</sup> and the filing of a notice to take a deposition.<sup>440</sup> In short, the Second District recognized that “the ‘activity’

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435. *Id.* The court, in this case, quoted language from *Rashard v. Cappiali*, 171 So.2d 581 (Fla. 3d Dist. 1965), which drew a distinction between failure to comply with an order of court as compared with a failure to comply with a procedural rule. The quoted *Rashard* language seems to indicate that an involuntary dismissal may only be employed when an order of court rather than a procedural rule has been violated. The authors take exception with this restrictive interpretation of the rule. (See note 406 *supra*) A court should be able to respond just as effectively and decisively to a flagrant violation of procedural rules as it is able to respond to a serious violation of a court order. The court’s discretionary actions should be governed by the gravity of the violation, not by its label.

436. FLA. R. CIV. P. 1.420(e).

437. 241 So.2d 436 (Fla. 2d Dist. 1970), *cert. denied*, 245 So.2d 88 (Fla. 1971).

438. FLA. R. CIV. P. 1.420(e) provides in part: “All actions in which it affirmatively appears that no action has been taken by filing of pleadings, order of court or otherwise for a period of one year . . .” (emphasis added).

439. See *Adams Eng’r. Co. v. Construction Prod. Corp.*, 156 So.2d 497 (Fla. 1963).

440. See *Rosenfeld v. Glickstein*, 200 So.2d 242 (Fla. 1st Dist. 1967); *Ownes v. Ken’s Paint & Body Shop*, 196 So.2d 17 (Fla. 3d Dist. 1967). See also *Cyprus Corp. v. Smith*, 218 So.2d 481 (Fla. 2d Dist. 1969) (defendant’s answer constitutes a filing); *City of Jackson-*

that tolls the running of the Rule may be outside the record as well as on the record. The only difference is that if it is outside the record it must be proven at a hearing before the Court . . . ."<sup>441</sup>

In a second case, *DeVaney v. Rumsch*,<sup>442</sup> a plaintiff filed suit against five defendants. Later, four of the defendants filed motions to dismiss for failure to prosecute. The file showed that the plaintiff had noticed one of the defendants for a deposition and sent notification of the deposition to a second defendant. The noticed defendant then filed a motion to quash service of process and the deposition and a notice of hearing, copies of which were sent to the second defendant. All of this activity occurred within one year of the dismissal for failure to prosecute, and the District Court of Appeal, First District, reversed the dismissal on the grounds that the aforementioned activity tolled the running of the one-year period for *all* the defendants.

While it is true that the said pleadings and orders pertained primarily to [one defendant], they may well have had a bearing upon the potential liability of the other four defendants. In any event, we think that, in view of the said pleadings and order, it cannot be correctly said that "no action" was taken during the said period.<sup>443</sup>

The rule is to be interpreted literally. Any pleading, motion, or other qualifying "activity" filed by either party will toll the running of the one-year period—including the filing of a motion to dismiss for failure to prosecute. In *Fund Insurance Co. v. Preskitt*,<sup>444</sup> the defendant had filed a motion for summary judgment on January 30, 1967. The following day, the plaintiff filed an affidavit in opposition to the motion for summary judgment. On January 30, 1968, the defendant served an amended summary judgment by mail which was not filed in the court clerk's office until February 1, 1968. Meanwhile, on January 31, 1968, the defendant filed a motion to dismiss for failure to prosecute which the court granted. On appeal, the District Court of Appeal, Fourth District, held that while "filing" rather than "service" controlled under the rule, the distinction made no difference in the case before it since the plaintiff's affidavit constituted "activity" within a one-year period of the filing of a dismissal motion. Noting that the defendant had not seasonably filed his motion and that rule 1.420(e) was not self-executing, the Fourth District reversed the dismissal.

If good cause is demonstrated and the necessary procedures fol-

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ville v. Hinson, 202 So.2d 806 (Fla. 1st Dist. 1967) (filing of additional interrogatories and answers to same also constitutes a filing) [both of these cases are cited in *Fund Ins. Co. v. Preskitt*, 231 So.2d 866, 867 n.2 (Fla. 4th Dist. 1970)].

441. *Whitney v. Whitney*, 241 So.2d 436, 439 (Fla. 2d Dist. 1970), *cert. denied*, 245 So.2d 88 (Fla. 1971).

442. 247 So.2d 69 (Fla. 1st Dist. 1971).

443. *Id.* at 70.

444. 231 So.2d 866 (Fla. 4th Dist. 1970).

lowed,<sup>445</sup> a dismissal for failure to prosecute may be avoided. The constituent elements of good cause and the proper time to assert same were involved in two District Court of Appeal, Third District, cases. In the first decision, *Dade County v. Moreno*,<sup>446</sup> it was held that a sworn statement alleging that the cause should not be dismissed because the statute of limitations had run was insufficient to measure up to the good cause standard even though the plaintiff's claim would be barred if dismissed. The court also cited one of its sister appellate courts which held that good cause was not shown even though a case was ready for trial, a dismissal would cause severe hardship, or the parties had unsuccessfully attempted to negotiate a settlement.<sup>447</sup> The second case, *Curry Corp. v. Greenfield*,<sup>448</sup> discussed the proper timing of the good cause showing. There, it was held that the demonstration must be made prior to the entry of a dismissal. Any attempt to show good cause after the entry of dismissal was held to be both untimely and insufficient.

Previously, the entry of a dismissal order pursuant to rule 1.420(e), could be reconsidered within 30 days, before the court lost jurisdiction. This point was driven home in *Wilds v. Permenter*,<sup>449</sup> where a plaintiff suffered a dismissal under rule 1.420(e) and did not seek to review same within the 30-day period. Nine months later, though, the case was tried before a jury over the defendant's objections, and a verdict was returned for the plaintiff. Apparently after the trial, the court, sua sponte, reinstated the cause by post trial order. The District Court of Appeal, Fourth District, was not impressed. It reversed the judgment on two grounds: first, no motion for reinstatement had been made within the 30-day period, and second, the record demonstrated no showing of good cause. The court concluded that "[w]hen a cause of action is dismissed for lack of prosecution and where a motion to reinstate the cause is not made within one month thereafter, the order of dismissal becomes final and the jurisdiction of the trial court over the subject matter and the cause is finally ended."<sup>450</sup>

## IX. CONTINUANCES

"A motion for continuance may be made only before or at the time the case is set for trial, unless good cause for failure to do so is shown or unless the ground for the motion arose after the action was set for trial."<sup>451</sup> The motion must be in writing and must state all of the facts giving rise to a need for continuance. If the continuance is being sought because of the

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445. See FLA. R. CIV. P. 1.420(e).

446. 227 So.2d 548 (Fla. 3d Dist. 1969).

447. *Id.* at 549, citing *Laug v. Murphy*, 205 So.2d 695, 697 (Fla. 4th Dist. 1968).

448. 235 So.2d 49 (Fla. 3d Dist. 1970) (per curiam).

449. 228 So.2d 408 (Fla. 4th Dist. 1969).

450. *Id.* at 409. Now, under FLA. R. CIV. P. 1.420(e), notice must be filed within five days before the hearing on a motion to dismiss for failure to prosecute.

451. FLA. R. CIV. P. 1.460(a).

non-availability of a witness, the date when such witness will be available must be included in the filing. In any event, the amount of time granted for a continuance shall be governed by the requisites of justice.<sup>452</sup>

The granting of a continuance is a matter for the court's discretion,<sup>453</sup> but the exercise of that discretion can be over-extended. In a District Court of Appeal, Third District, case,<sup>454</sup> numerous delays had been encountered in setting a case for trial including one continuance because of the illness of plaintiff counsel's father. The case was reset for trial at a later date. On the morning of trial, plaintiff's counsel moved for a continuance on the grounds that he was unaware that the case was to be tried on that date, but was under the impression that a calendar hearing had been scheduled. The motion was denied, and the case tried. After an apparently less than impressive presentation which included only one witness' testimony, a directed verdict on both the main claim and later the defendant's counterclaim was granted. Plaintiff's counsel then successfully moved for a new trial on the grounds that the continuance motion had been improperly denied. The defendant appealed. The Third District reinstated the final judgment and held that the trial judge had misapplied existing case law in Florida on the point of continuances.<sup>455</sup> The court stated that the motion was properly refused initially by the court for two reasons: first, it was not in writing as required by rule 1.460(b); and second, the grounds stated, misunderstanding of the date for trial, fell short of the required good cause standard.

However, in *Tsavaris v. Tsavaris*,<sup>456</sup> a trial court was held to have abused its discretion by denying a continuance in a divorce action where the plaintiff had replaced her counsel one day before trial, and a continuance had been moved for the next day. This was thought by the District Court of Appeal, Second District, to have been amply supported by good cause, and the lower court's denial was reversed. The Second District

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452. FLA. R. CIV. P. 1.460(b)-(c).

453. See, e.g., *S & S Pharm., Inc. v. Hirschfield*, 226 So.2d 874 (Fla. 3d Dist. 1969), where it was held not to be an abuse of discretion for a trial judge to deny a motion for a continuance sought the morning of the trial when the defendant-movant had adequate time to complete discovery weeks before the trial date.

454. *Archer-Daniels-Midland Co. v. A & P Bakery Sup. & Equip. Co.*, 240 So.2d 73 (Fla. 3d Dist. 1970), cert. denied, 244 So.2d 432 (Fla. 1971).

455. The court determined that the initial ruling on the motion for continuance was error because of the law set forth in *Courtney v. Central Trust Co.*, 112 Fla. 298, 150 So. 276 (1933), and *Western Union Telegraph Co. v. Suit*, 153 Fla. 490, 15 So.2d 33 (1943). In the *Courtney* decision the Supreme Court held that a continuance of trial was improperly denied where a written motion for a continuance had been made and where the facts presented by the record showed that by reason of his wife's illness defendant's attorney had not been able to prepare defendant's case and that the attorney, because of worry over his wife's condition, was not in a mental condition to enable him to properly conduct his client's case. In the *Western Union* decision the Supreme Court held that it was improper for a trial judge to proceed to trial where he was informed that the absence of the defendant and its attorney was due to the actual illness of counsel, and defendant had no knowledge of this fact or notice of the case.

*Id.* at 74-75.

456. 244 So.2d 450 (Fla. 2d Dist. 1971).

specifically rejected the trial judge's determination that "there ha[d] been no sufficient showing to constitute a reason for the plaintiff to discharge her counsel . . . and that her rejection of proposed settlement and voluntary discharge of counsel [did] not constitute grounds for a continuance."<sup>457</sup> The court ruled that the plaintiff had no burden of demonstrating sufficient reason to discharge her counsel unless the court found "some *derelection* on her part prejudicial to an orderly disposition of the cause or prejudicial otherwise to the court or other parties."<sup>458</sup>

## X. DIRECTED VERDICTS

Rule 1.480 provides that a party may move the court to direct a verdict in an action at the close of the presentation of the opposing party's evidence without prejudicing his own opportunity to present evidence in the event the motion is denied. In addition, "[w]hen a motion for a directed verdict made at the close of all of the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."<sup>459</sup> However, the power to direct a verdict should be exercised in a cautious manner, "and a motion for a directed verdict should not be granted unless the evidence is such that under no view which the jury might lawfully take of the evidence favorable to the adverse party could a verdict for the latter party be sustained."<sup>460</sup> For instance, the District Court of Appeal, Fourth District, used this test to reverse a directed verdict granted by the circuit court. The case, *Little v. Publix Super-*

457. *Id.* at 452.

458. *Id.* at 453 (emphasis supplied by court). In this case, the plaintiff's attorney had died, and his partner continued the representation. He received, submitted, and encouraged acceptance of a settlement agreement of which plaintiff did not approve. The plaintiff subsequently lost faith in her attorney and after the first day of trial removed him and substituted new counsel. The Second District stated in response to these facts:

First of all, appellant had an absolute right to reject counsel's recommendations as to the proffered settlement and submit the matters to the court, even though the wisdom of such course may be open to question; and she had an equal right to change attorneys as long as there is no basis for a determination that she was attempting to frustrate trial determination of the cause. We can find no such basis. Indeed, as she was the plaintiff, for all that appears a speedy conclusion of the cause inured to her benefit.

*Id.* at 452-53.

459. FLA. R. Civ. P. 1.480(b).

Within ten days after the reception of a verdict a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict or if a verdict was not returned, such party may move for judgment in accordance with the motion for a directed verdict within ten days after the jury has been discharged.

*Id.*

460. *Bell's Fish & Poultry Co. v. Jenkins*, 227 So.2d 512, 513 (Fla. 1st Dist. 1969), *cert. denied*, 237 So.2d 175 (Fla. 1970). In that case, a defendant appealed from an adverse judgment claiming that the trial court improperly denied a motion for directed verdict on the grounds that no evidence showing negligence had been presented. (Defendant's truck had collided with plaintiff's after defendant was struck in the rear by another vehicle.) The court affirmed the trial court's denial of the motion.



*markets, Inc.*,<sup>461</sup> involved a personal injury action where a plaintiff, who had been standing at one end of a store aisle for 15 to 20 minutes and reportedly heard nothing unusual during that time, slipped and fell on clear liquid spilled on the floor minutes later. The defendants successfully moved for a directed verdict on the grounds that there had been no evidence presented which demonstrated that the store had adequate notice of the condition.

The Fourth District reversed, noting that the defendant, for purposes of the motion, admitted "every reasonable inference that a jury might fairly and reasonably arrive at favorable to the adverse party."<sup>462</sup> The court concluded that the 15 to 20 minute period "could be deemed sufficient for the defendant to be charged with knowledge of the condition and a reasonable time in which to correct it."<sup>463</sup>

In determining the merits of a motion for a directed verdict in a negligence action, the trial judge may not reconcile conflicting evidence, nor determine the credibility of witnesses. The sole function of the court is to examine the trial evidence to determine if a jury of reasonable men could properly conclude that the defendant was guilty of negligence proximately causing injuries to the plaintiff.<sup>464</sup> If there are any evidentiary conflicts which arise during a trial, those conflicts should be resolved by the jury and not by the court. "Similarly, if there are any conflicting reasonable inferences which may be adduced from the evidence, the case should be submitted to the jury as a question of fact and not taken from them and passed upon by the court as a question of law."<sup>465</sup> On appeal, a directed verdict undergoes close scrutiny and is subjected to these same stringent

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461. 234 So.2d 132 (Fla. 4th Dist. 1970).

462. *Id.* at 133.

463. *Id.* at 134.

464. *Bell's Fish & Poultry Co. v. Jenkins*, 227 So.2d 512 (Fla. 1st Dist. 1969), *cert. denied*, 237 So.2d 175 (Fla. 1970). See *Ameisen v. Royal Con. Hotels Corp.*, 226 So.2d 463 (Fla. 4th Dist. 1969), a slip and fall case where a directed verdict was reversed on the grounds that a reasonable jury question had been formulated on the question of improper maintenance giving rise to a dangerous condition. See also *Thee v. Manor Pines Conv. Center, Inc.*, 235 So.2d 64 (Fla. 4th Dist. 1970); *Katz v. Harrington*, 226 So.2d 11 (Fla. 3d Dist. 1969).

465. *Armstrong Cork Co. v. Crook*, 227 So.2d 64, 67 (Fla. 1st Dist. 1969). This case involved an adverse possession claim. The trial court directed a verdict for the defendant on the grounds that he had presented uncontroverted evidence of adverse possession including color of title. The plaintiff had objected to the entry of a directed verdict on the grounds that the deed which constituted "color of title" did not correctly describe the land in question. The appellate court agreed with the plaintiff and reversed the entry of final judgment. The appeals panel also found the evidence on all of the elements of adverse possession to fall short of the "clear and positive proof" standard required for the entry of a directed verdict. *Id.* at 66.

See also *Evin R. Welch & Co. v. Johnson*, 228 So.2d 425 (Fla. 4th Dist. 1969), a brokerage commission action, where the District Court of Appeal, Fourth District, reversed a directed verdict and stated that "[i]f a recovery can be lawfully had upon any view taken of facts which the evidence tends to establish, a case should not be taken from the jury by director of verdict." *Id.* at 427.

standards<sup>466</sup> "to prevent any infringement upon the organic right of trial by jury."<sup>467</sup>

Two cases recently decided by the Supreme Court of Florida reflect the hesitancy of the high court to allow the entry of a directed verdict to cut off jury consideration of triable factual issues. Interestingly enough, both cases, *Lopez v. Buck*<sup>468</sup> and *Reyes v. Parsons*,<sup>469</sup> quashed district court of appeal opinions which had ordered the issuance of directed verdicts (where the circuit courts had refused to enter such orders at trial), and the reinstatement of the jury verdicts. In *Lopez*, an automobile accident involving personal injuries was under consideration. The plaintiff's car had been sideswiped from the front to the rear, and the plaintiff claimed that defendant had hit him from the rear as plaintiff was starting-up from an intersection after stopping for a traffic signal. Defendant admitted liability, and the question of contributory negligence and damages went to the jury. At the conclusion of all of the evidence plaintiff moved for, but was denied a directed verdict, and a judgment for defendant was subsequently rendered. On appeal, the District Court of Appeal, Second District, reversed the denial of the directed verdict. In so holding, the court held that the conflict between Lopez' claim that he had been hit from behind and the defendant's claim that he hit plaintiff initially in the front was immaterial to the question of contributory negligence and irrelevant to the question of liability or damages.<sup>470</sup> On conflict certiorari to the su-

466. See, e.g., *Williams v. Dade Cty.*, 237 So.2d 776, 777 (Fla. 3d Dist. 1970) where the court stated:

In examining each of the grounds appellees have presented for affirmance [of a directed verdict], we shall be governed by the principle that directed verdicts should be cautiously granted and will not be sustained unless the record when viewed in the light most favorable to the party against whom the motion is directed fails to show any reasonable view of the evidence which could sustain the position of that party.

See also *Valdes v. Prudence Mut. Cas. Co.*, 226 So.2d 119 (Fla. 3d Dist. 1969).

467. *Bell's Fish & Poultry Co. v. Jenkins*, 227 So.2d 512, 514 (Fla. 1st Dist. 1969), cert. denied, 237 So.2d 175 (Fla. 1970).

468. 250 So.2d 6 (Fla. 1971), rev'g 239 So.2d 103 (Fla. 2d Dist. 1970) [hereinafter cited as *Lopez*].

469. 238 So.2d 561 (Fla. 1970), rev'g, 226 So.2d 43 (Fla. 4th Dist. 1969) [hereinafter cited as *Reyes*].

470. In denying appellant's motion for a directed verdict, the trial court judge was apparently of the opinion that the conflicting versions as to which part of the Lopez vehicle was initially struck created a fact question, pertinent to the issue of contributory negligence, which was for the jury. Although disputed issues of fact are to be resolved by the jury, there is no need for its deliberation when the facts in question have no bearing upon the issue of liability or damages. Appellant's testimony that he was in the right-hand lane prior to and at the time of the accident is un rebutted and cannot be seriously questioned. Whether defendant cut in front of appellant's vehicle, turned into its side, or hit it from the rear is not controlling on the issue of contributory negligence in this case. Plaintiff demonstrated that he was proceeding in a normal direction, within normal speed, in his lane of traffic. No evidence was presented by either party indicating any negligence on appellant's part.

*Lopez v. Buck*, 239 So.2d 103, 104 (Fla. 2d Dist. 1970).

preme court, the Second District's opinion was quashed, and the jury verdict reinstated.<sup>471</sup> The court suggested that the very language of the Second District's opinion which pointed up the conflict between the two versions of the location of initial impact gave rise "to materially conflicting inferences on the question of contributory negligence."<sup>472</sup> The court concluded that in ruling as it did, the Second District ignored the well established rule that conflicting inferences deducible from the evidence and all other reasonable inferences presented by the evidence must be indulged on behalf of the non-moving party.<sup>473</sup>

In *Reyes*, the trial court had held that a beautician who was traveling with her employer (the driver) in an automobile involved in an accident could not be held absolutely to have been "a guest" and susceptible to the provisions of the guest passenger statute.<sup>474</sup> Consequently, the trial judge refused defendant's motion for a directed verdict and sent the question of the plaintiff's status as guest or business invitee to the jury, which returned a verdict for the plaintiff. The defendant appealed, and the District Court of Appeal, Fourth District, reversed the lower court and held that while evidence which "is susceptible of reasonable contrary inferences . . ." should be submitted to the jury for determination, "the legal sufficiency of the evidence to support an issue is always a question of law for the court."<sup>475</sup>

The court reasoned that the question of whether or not the plaintiff was simply a guest or actually conferred a business benefit upon the defendant was a question of law for the court to decide.<sup>476</sup> The Fourth District consequently reversed the first judgment and ordered the issuance of a directed verdict. As in *Lopez*, the Supreme Court of Florida took a dim view of the use of the directed verdict. The court held that while the evidence "may not have been conflicting in any material matter," it did

471. *Lopez v. Buck*, 250 So.2d 6 (Fla. 1971).

472. *Id.* at 8.

473. *Id.*, citing *Vanzant v. Davies*, 215 So.2d 504, 505 (Fla. 1st Dist. 1968):

[U]nder our court system, the jury in an action at law is the trier of the facts and in such capacity resolves the conflicts in the evidence, as well as the conflicting inferences deducible from the same evidence. Neither the trial court nor the appellate court is authorized to substitute its judgment for that of the jury as to questions of fact. [emphasis supplied by court]

and *Lloyd v. McKenna*, 179 So.2d 583 (Fla. 3d Dist. 1965).

474. FLA. STAT. § 320.59 (1967). The guest statute was repealed by Fla. Laws 1972, ch. 72-1.

475. *Reyes v. Parson*, 226 So.2d 43, 44 (Fla. 4th Dist. 1969).

476. The guest passenger statute has been the subject of numerous decisions as a consequence of which the courts have announced certain minimum standards that the passenger must meet in order to be removed from the scope of the statute. When the evidence, viewed most favorably to the plaintiff passenger establishes circumstances which fail to meet these minimum standards, then as a matter of law the evidence is legally insufficient to remove the plaintiff passenger from the guest passenger statute and where, as here, plaintiff seeks to recover on simple negligence only, the court has a duty to direct a verdict for the defendant.

*Id.* at 44, citing FLA. STAT. § 320.59 (1967); *Swilley v. Economy Cab Co.*, 56 So.2d 914 (Fla. 1951).

"admit of different reasonable inferences . . .,"<sup>477</sup> and the factual issue of the plaintiff's status was thus properly sent by the trial judge to the jury. The court concluded that since the judge and the jury had considered evidence relating to the nature of plaintiff's and defendant's relationship, the Fourth District had acted improperly when it overturned the verdict. The court then quashed the appellate decision and reinstated the jury verdict.

In *Holman v. Ford Motor Co.*,<sup>478</sup> the District Court of Appeal, First District, was faced with a situation involving numerous procedural maneuvers at the trial level. The plaintiff had brought an action against a new car dealer and the Ford Motor Company alleging negligence and breach of implied warranty. The judge entered a directed verdict against both defendants on the implied warranty count, but ruled that the negligence issue would have to go to the jury. The case looked good for the plaintiff since Ford had admitted on the record that it was obvious that either one of the defendants was liable. Sensing victory, the plaintiff voluntarily dismissed the dealer to remove him from the jury's consideration of damages and decided to go after the big money. Unfortunately, things began to break down at this point. The trial judge withdrew the directed verdict on the warranty count, and the plaintiff withdrew the motion for voluntary dismissal against the dealer, withdrew his abandonment of the negligence count, and moved for directed verdicts against both defendants. The court refused to grant the directed verdicts; the plaintiff again dismissed the dealer and went to the jury against Ford alone on both counts. He lost.

On appeal, the plaintiff argued, *inter alia*, that the trial judge acted improperly when he vacated his directed verdicts once they had been entered. The District Court of Appeal, First District, disagreed and held that a directed verdict was an interlocutory decree and as such was "always under the control of the court until final disposition of the suit, and . . . [could] be modified or rescinded upon sufficient grounds at any time before final judgment."<sup>479</sup> In any event, the First District held that all of the directed verdicts were improperly granted since the record contained evidence with inferences which would block the entry of such an order.<sup>480</sup>

A motion for a directed verdict which is reserved for determination until after a jury verdict has been returned is commonly called a judgment

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477. *Parson v. Reyes*, 238 So.2d 561, 564 (Fla. 1970).

478. 239 So.2d 40 (Fla. 1st Dist. 1970). See note 17 *supra* and accompanying text.

479. *Id.* at 43, citing *Alabama Hotel Co. v. J. L. Mott Iron Works*, 86 Fla. 608, 98 So. 825 (1924); *Mitchell v. Mason*, 90 Fla. 201, 106 So. 430 (1925).

480. The case was, however, reversed on other grounds and sent back for retrial. One year later, the case was back before the First District. The plaintiff had suffered a summary judgment on the grounds that he had collected a judgment from the dealer for negligent installation of equipment in another action and was thus barred from asserting a claim of negligent manufacture against the manufacturer. This ruling was affirmed. *Arenson v. Ford Motor Co.*, 254 So.2d 812 (Fla. 1st Dist. 1971).

notwithstanding the verdict<sup>481</sup> and is subjected to the same severe standards of application as is a motion for a directed verdict.

Motions for judgment notwithstanding verdict, like motions for directed verdict, should be resolved with extreme caution since the granting thereof holds that one side of the case is essentially devoid of probative evidence . . . . The movant admits all material facts as attested by his adversary and also admits all inferences of fact favorable to the adversary that reasonably might be drawn from the evidence as a whole. . . . If there is room for difference among reasonable men as to the existence of a material fact sought to be established, or as to a material inference which reasonably might be drawn from established facts, the case should be submitted to the jury.<sup>482</sup>

Consequently, in *Miller v. Mutual of Omaha Insurance Co.*,<sup>483</sup> the District Court of Appeal, First District, reversed the entry of such an order on the grounds that the jury verdict on the question of the intentional infliction of mental distress should not have been overturned by the trial judge. In that case, a woman of little formal education had applied for and had been given a medical insurance contract with the defendant, had fully disclosed her prior medical history to a salesman, and had authorized her doctors to release any requested medical information to the defendant. Shortly thereafter, plaintiff was diagnosed as suffering from Addison's Disease, which she claimed she had never heard of before. The defendant's agent went to plaintiff's home, was quite abusive, and took the health insurance policy away from plaintiff without her permission. The next day plaintiff became ill and was hospitalized. The First District viewed this evidence as sufficiently probative to have sent the issue of the taking of the policy without permission and wrongful mistreatment of plaintiff to the jury. However, once all of the criteria of a directed verdict have been met in a particular case, and the court finds that the jury verdict is contrary to law and the evidence presented, upon proper motion setting forth the grounds with particularity, a judgment notwithstanding the verdict may properly be granted.<sup>484</sup>

## XI. DEFAULT JUDGMENTS

"When a party against whom affirmative relief is sought has failed to file or serve any paper in the action," the party seeking the relief

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481. Under the present practice provided for by Rule 1.480 RCP, the ruling made on the motion for judgment notwithstanding the verdict, properly entitled "motion for judgment in accord with directed verdict," is a deferred ruling on the motion for directed verdict.

Cheek v. Long, 235 So.2d 349, 352 (Fla. 2d Dist. 1970).

482. *Miller v. Mutual of Omaha Ins. Co.*, 235 So.2d 33, 35 (Fla. 1st Dist. 1970), cert. denied, 238 So.2d 423 (Fla. 1970); citing with approval the language of *Deese v. White Belt Dairy Farms, Inc.*, 160 So.2d 543, 545 (Fla. 2d Dist. 1964); quoted in *Smith v. Peninsular Ins. Co.*, 181 So.2d 212, 217 (Fla. 1st Dist. 1965).

483. 235 So.2d 33, 35 (Fla. 1st Dist. 1970), cert. denied, 238 So.2d 423 (Fla. 1970).

484. *Cheek v. Long*, 235 So.2d 349 (Fla. 2d Dist. 1970).

may have the clerk enter a default against the other party.<sup>485</sup> In addition, the court may upon application or by its own motion enter a default judgment when a party (against whom affirmative relief is sought) fails to plead or otherwise defend as provided by the rules of procedure, any applicable statutes, or orders of court.<sup>486</sup> It should be noted that a party who has filed any paper in the court file from the time an action has been commenced is entitled to notice of the application for entry of default pursuant to rule 1.500(b). Also, if a party pleads or otherwise defends prior to the entry of a default or a default judgment, none can be entered.<sup>487</sup>

In *Freedman v. Freedman*,<sup>488</sup> the defendant filed an unsuccessful motion attacking the validity of substituted service of process. Later, after the motion was denied, the plaintiff filed a motion to enter a default before the court. Prior to the hearing, the defendant filed an answer, but the court entered a default and final judgment, which it refused to vacate. On appeal, the default was vacated pursuant to rule 1.500(c), and the case remanded.<sup>489</sup> Similarly, in *Pollack v. Korn*,<sup>490</sup> a plaintiff's complaint was dismissed, and he was given 20 days to amend. On the twenty-first day the defendant filed a motion to enter a default and default judgment which the judge signed. The following morning at 9:18 a.m. the plaintiff filed his amended complaint, and at 10:20 a.m. the judge's order of default judgment was filed. On motion, the judge refused to set aside the judgment. An appeal was taken to the District Court of Appeal, Third District. It reversed and held that regardless of all other errors, the trial judge "under these circumstances . . . abused his discretion in not setting aside the order of default."<sup>491</sup>

Generally, the Florida courts "follow a liberal policy in setting aside defaults. If there is any reasonable doubt in the matter it is resolved

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485. FLA. R. CIV. P. 1.500(a).

486. FLA. R. CIV. P. 1.500(b).

487. FLA. R. CIV. P. 1.500(c).

488. 235 So.2d 544 (Fla. 3d Dist. 1970), *cert. denied*, 241 So.2d 859 (Fla. 1970).

489. It should be noted, however, that the plaintiff's attorney could have avoided this result by a simple procedural maneuver. Instead of moving the court to enter what amounted to a motion for a default judgment, the attorney should have entered a default with the clerk of the court. Then, the defendant would not have been able to file his responsive pleading until he moved the court to vacate the default. Meanwhile, the plaintiff could then have asked the court for the entry of a default judgment.

The important procedural difference between the two techniques is that no matter how egregious a defendant's failure to comply with the rules of court, if he further pleads before the entry of a default, the court may not enter a default or a default judgment because of rule 1.500(c). However, once a default is entered, the defendant's filings, save a motion to set aside the default, will not be accepted by the clerk. Then, the court may consider the gravity of the defendant's conduct and fashion an adequate remedy. While the entry of a default judgment at that juncture might not necessarily be affirmed on appeal unless there were appropriate circumstances, the court in setting aside the default might well apply sanctions against the defaulting party.

490. 237 So.2d 556 (Fla. 3d Dist. 1970).

491. *Id.* at 557. Among the errors which apparently were made were the failure to notify the plaintiff of an application for the entry of default pursuant to rule 1.500(b) and the failure of the judge in not immediately rescinding the default order upon discovering that the complaint had been filed before the order in contravention of rule 1.500(c).

in favor of . . . allowing a trial upon the merits of the case." However, "those principles are to be considered together with the principle that judgments should have a finality which ought not lightly be set aside."<sup>492</sup> Consequently, the failure of an insurance company to defend an action for many months when the defendant presumes that the company will be insufficient to justify the setting aside of a default judgment. If a default were set aside under those circumstances, "[s]uch a ruling would cast doubt upon the finality of every judgment entered after a default . . ." in similar actions.<sup>493</sup> Similarly, where a default was entered because of the failure of a corporation to defend in an action, the corporation's default was not set aside because there had been no allegation or proof of excusable neglect on the part of the corporation.<sup>494</sup>

However, even if a default is entered and upheld on appeal, that does not mean that the litigation has come to an end. In the case of a claim involving unliquidated damages, a court must have a trial on the question of damages,<sup>495</sup> but if the claim is liquidated, the order entering default judgment may contain the damage judgment also.<sup>496</sup> In addition, a defendant who suffers a default for failure to file an answer in an equity suit "can only be said to have admitted the well-pleaded facts and to have acquiesced in the relief prayed for."<sup>497</sup> Thus, in *Williams v. Williams*,<sup>498</sup> where a plaintiff-husband had not pleaded facts sufficient to warrant custody of a child, nor demanded such relief, but had simply sought a divorce, due process would prevent a court from awarding custody where a default had been properly entered against the defendant-wife.

Even if a court must set aside a default entered for one reason or another, it "may, in exercising its judicial discretion, fix reasonable terms and conditions in the order vacating a default."<sup>499</sup> On interlocutory appeal, the District Court of Appeal, Third District, in *Jordan v. Jordan*,<sup>500</sup> approved the application of this doctrine by a trial judge who set aside a default judgment in a divorce action, but refused to grant temporary alimony, legal costs, and attorney's fees. The court also struck the defendant's counterclaim. However, the court did take issue with the trial judge's ruling that defendant had permanently lost any claim to any of

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492. *Lawn v. Wasserman*, 226 So.2d 261, 263 (Fla. 3d Dist. 1969).

493. *Id.* See notes 610-11 *infra* and accompanying text.

494. *Winky's Inc. v. Francis*, 229 So.2d 903 (Fla. 3d Dist. 1969).

495. When a default is entered on an unliquidated damage claim, the defendant should be afforded the right to notice; "an opportunity to participate in the trial on damages, and to have the damage issues tried before a jury . . .," if the plaintiff has properly moved for a jury trial during the proceedings. *Riley v. Gustinger*, 235 So.2d 364, 366 (Fla. 3d Dist. 1970). See also *Winky's Inc. v. Francis*, 229 So.2d 903 (Fla. 3d Dist. 1969) and authorities cited therein.

496. FLA. R. CIV. P. 1.500(e).

497. *Williams v. Williams*, 227 So.2d 746, 748 (Fla. 2d Dist. 1969).

498. *Id.*

499. *Jordan v. Jordan*, 243 So.2d 607, 608 (Fla. 3d Dist. 1971).

500. *Id.*

the three aforementioned costs. The Third District reversed this section of the order on the grounds that it was too soon for the trial judge to so rule since the proper time to consider such matters on a permanent basis was at the final hearing.

## XII. SUMMARY JUDGMENTS

### A. *In General*

Summary judgments are generally not a favored device for terminating litigation in Florida. They are viewed with special scrutiny, and a jury trial is favored whenever possible.<sup>501</sup> The purpose of a summary judgment, when allowed, is threefold: first, to determine if there is sufficient evidence to justify a trial on the issues raised by the pleadings; second, to expedite litigation; and third, to obviate expense.<sup>502</sup>

The District Court of Appeal, First District, has set forth two required elements to successfully maintain a summary judgment: first, there must be no genuine issue as to any material fact; and second, the moving party must be entitled to a summary judgment as a matter of law.<sup>503</sup> Additionally, it is well settled that the "burden of proving the absence of any material facts so that no genuine issue is left for a jury determination is on the movant."<sup>504</sup> This burden extends to the bounds of all reasonable inferences which may be drawn in favor of the non-moving party,<sup>505</sup> and, of course, all evidence will be viewed in a light most favorable to the nonmovant.<sup>506</sup>

In ruling on a motion for summary judgment, a trial judge may not pass on the credibility of witnesses or weigh the evidence,<sup>507</sup> nor may a summary judgment procedure become a "trial by affidavit."<sup>508</sup> However, when the "movant with competent witnesses shows to the point of a prima facie case and beyond, based on personal knowledge and admissible evidence, [that] there is no dispute, no issue, and . . . no evidence to the contrary," he is entitled to a summary judgment.<sup>509</sup> However, where a plaintiff moves for summary judgment, the burden is also upon him to "conclusively refute" any affirmative defenses raised by the defendant.<sup>510</sup> Failure to do so will leave a material issue of fact in con-

501. *McClain v. McDermott*, 232 So.2d 161 (Fla. 1970), *rev'g* 220 So.2d 394 (Fla. 3d Dist. 1969) (summary judgment allowed in negligence action).

502. *Page v. Staley*, 226 So.2d 129 (Fla. 4th Dist. 1969).

503. *Parkhurst v. Noble*, 238 So.2d 691 (Fla. 1st Dist. 1970); *Hart v. Hart*, 234 So.2d 393 (Fla. 1st Dist. 1970).

504. *Byrd v. Leach*, 226 So.2d 866, 868 (Fla. 4th Dist. 1969). "The term 'genuine issue' means a real, as opposed to a false or colorable, issue." *Id.*

505. *Id.*

506. *Shollenberger v. Baskin*, 227 So.2d 79 (Fla. 4th Dist. 1969).

507. *Industrial Sales & Serv. Corp. v. Duval Motors*, 245 So.2d 891 (Fla. 3d Dist. 1971).

508. *Durkin v. Morgan*, 227 So.2d 231, 232 (Fla. 4th Dist. 1969).

509. *Page v. Staley*, 226 So.2d 129, 131 (Fla. 3d Dist. 1969) (uncontroverted denial of defendant that he had not uttered slander entitled him to summary judgment).

510. *Jenkins v. Graham*, 237 So.2d 330, 332 (Fla. 4th Dist. 1970). There, the defendant



trovercy regarding that defense sufficient to preclude the granting of a summary judgment.

Turning to specific areas of the law, it is generally accepted that issues of negligence are usually not properly disposed of by a summary judgment. For instance, in *Avampato v. Markus*,<sup>511</sup> a defendant testified that he had "blacked out" at the time of an accident sued upon and that he had no prior medical history of this type of disorder. A summary judgment entered in his favor was reversed by the District Court of Appeal, Fourth District. The court held that the evidence contained inferences which might indicate prior physical condition which might have been responsible for the "black out," thus negating the entry of summary judgment.<sup>512</sup>

In *Shollenberger v. Baskin*,<sup>513</sup> a summary judgment was reversed on the grounds that the testimony of the plaintiff raised conflicting inferences regarding the condition of a ladder which he fell from. Similarly, in another case dealing with injuries suffered by a spectator struck by a baseball while sitting in stands behind a backstop, the court held that while there did not appear to be any substantial conflict in the evidentiary facts, various conclusions were seen to be logically deducible from the facts which would relate to the ultimate factual issues of negligence, contributory negligence, and assumption of the risk.<sup>514</sup> The court consequently reversed a summary judgment which had been granted in favor of the defendants. Fraud cases, like negligence, are also not generally subjects of the summary judgment procedure.<sup>515</sup>

While a heavy burden lies with the movant in summary judgment procedures, the nonmoving party is not without a certain degree of burden also. The nonmovant, for instance, "may not merely assert that an issue does exist, but he must go forward with evidence sufficient to generate an issue of material fact . . . ," but this does not require him to present his entire case.<sup>516</sup> The nonmovant also cannot raise a factual issue

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had raised a defense based upon plaintiff's duty to mitigate damages in a suit on a mechanic's lien foreclosure. The only evidence put forward by the plaintiff on this point was an affidavit stating that he had no knowledge of defendant's financial plight. This was held to be insufficient, and the summary judgment granted to the plaintiff was reversed.

511. 245 So.2d 676 (Fla. 4th Dist. 1971).

512. It is a well settled proposition that the issue of negligence is not to be determined on motion for summary judgment where the record suggests a factual issue or presents circumstances from which a jury might properly draw conflicting inferences. Any doubt as to the propriety of the entry of a summary judgment should be resolved in favor of the party against whom such summary judgment is sought.

*Id.* at 678.

513. 227 So.2d 79 (Fla. 4th Dist. 1969). See also *Cefkin v. Florida Power & Light Co.*, 227 So.2d 48 (Fla. 4th Dist. 1969) (moving party's failure to conclusively demonstrate absence of all genuine issues of material fact fatal to validity of summary final judgment).

514. *Jackson v. Atlanta Braves, Inc.*, 227 So.2d 63 (Fla. 4th Dist. 1969), *cert. dismissed*, 237 So.2d 540 (Fla. 1970).

515. *Bryant v. Small*, 236 So.2d 150 (Fla. 3d Dist. 1970) (per curiam). See also *Tippett v. Frank*, 238 So.2d 671 (Fla. 3d Dist. 1970).

516. *Byrd v. Leach*, 226 So.2d 866, 868 (Fla. 4th Dist. 1969). "The burden is upon the moving party to demonstrate the nonexistence of a genuine issue of material fact and

by merely disagreeing with the facts established by the competent evidence of the moving party, or because he would like a jury to examine the evidence.<sup>517</sup> Finally, the party who is being moved against may not alter the position of his previously filed pleadings, admissions, affidavits, depositions, or testimony for the sole purpose of defeating the summary judgment.<sup>518</sup>

When a question of law arises in summary judgment proceedings, it is, of course, determined by the court. For instance, where the absence of probable cause for arrest was required to be established as a condition for recovery in an action, the nonexistence of any evidence on this point on the record and the lack of allegations in the pleadings will entitle a defendant to a summary judgment regardless of any other factual disputes.<sup>519</sup> Likewise, in a workmen's compensation action, when no facts are in dispute, save a determination of whether one of the parties is an "employer" under the law, a question of law is presented for the court to decide and not a factual question to be determined by a jury.<sup>520</sup> As far as affirmative defenses are concerned, regardless of the number of defenses put forward and despite the rule requiring the moving party to refute all affirmative defenses,<sup>521</sup> if the defenses put forward are legally insufficient, the action is ripe for summary judgment.<sup>522</sup>

Rule 1.510(c) provides that a motion for summary judgment must be served at least 20 days prior to the hearing on the motion. In *Blatch v. Wesley*,<sup>523</sup> only 18 days had elapsed between the filing of the motion and the actual hearing. On appeal after the entry of final summary judgment, the appellant maintained that the judgment was void because of the shortened time period. The District Court of Appeal, Third District, did not agree and held: "The time set for 1.510(c), R.C.P., is not jurisdictional. It may therefore be waived by a failure to object or move for a continuance."<sup>524</sup> The obvious point made by the Third District was that reason-

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there is no duty on the party moved against to demonstrate the existence of such an issue until after the movant has satisfied his initial burden." *Hurricane Boats, Inc. v. Certified Ind. Fab.*, 246 So.2d 174, 175 (Fla. 3d Dist. 1971).

517. *Robinson v. Loyola Foundation, Inc.*, 236 So.2d 154 (Fla. 1st Dist. 1970).

Issues of fact do not arise merely because a party disagrees with the facts established by competent evidence submitted by the moving party in a summary judgment proceeding, nor merely because the party moved against would like the opportunity of having a jury pass upon such facts and make an independent determination as to the correctness thereof.

*Id.* at 160.

518. *Home Loan Co. v. Sloane Co.*, 240 So.2d 526 (Fla. 2d Dist. 1970).

519. *Starkenstein v. City of Daytona Beach*, 229 So.2d 274 (Fla. 1st Dist. 1969) (per curiam). See also *Blatch v. Wesley*, 238 So.2d 308 (Fla. 3d Dist. 1970), cert. denied, 240 So.2d 645 (Fla. 1970) (summary judgment entered because of prior judgment—regardless of material facts relating to grounds for garnishment).

520. *Hamilton v. Shell Oil Co.*, 233 So.2d 179 (Fla. 4th Dist. 1970), cert. denied, 237 So.2d 762 (Fla. 1970).

521. See note 510 *supra* and accompanying text.

522. *Tippett v. Frank*, 238 So.2d 671 (Fla. 3d Dist. 1970).

523. 238 So.2d 308 (Fla. 3d Dist. 1970), cert. denied, 240 So.2d 645 (Fla. 1970).

524. *Id.* at 309.

able notice had been provided even though such notice was two days shorter than required.

Earlier in 1970, that same court decided *Bernard Marko & Associates, Inc. v. Steele*.<sup>525</sup> In that case, the defendant's motion for summary judgment had been filed at least 20 days prior to the hearing, but during the hearing one of the co-defendants moved for and was granted leave to join in the motion without any objections by the plaintiff. The summary judgment was granted, and the plaintiff appealed on the grounds that there had been improper notice. The Third District upheld the judgment on two grounds: first, the plaintiff had not been prejudiced in any way because the co-defendant was in the same legal position as the moving defendant; and second, the plaintiff had waived any right to object to the timing or the joinder by failing to object at the time of the hearing. Thus, it is clear, at least in the Third District, that any objections to the timing of a motion for summary judgment must be made prior to or at the actual hearing or they will be waived.

### B. Sufficiency of Affidavits

"If the evidence [presented] by affidavit, deposition or otherwise demonstrates the existence of a genuine issue, summary judgment should be denied."<sup>526</sup> Consequently, the types and contents of those documents are of critical significance. Rule 1.510(e) prescribes that affidavits must be based on personal knowledge, must set forth facts which are admissible in evidence, and must show that the affiant is competent to testify on the matters contained therein. In addition, any documents referred to in the affidavit must be attached to it,<sup>527</sup> and an affidavit "may not be based upon factual conclusions or conclusions of law."<sup>528</sup>

The law is clear that the specification in rule 1.510(e) that affidavits must contain facts reflecting personal knowledge is strictly construed. Thus, an affidavit which states that the affiant has read a pleading and that "the allegations contained therein [are] true and correct to the best of his own personal knowledge and belief . . ." are insufficient and will not be considered by the court.<sup>529</sup>

525. 230 So.2d 42 (Fla. 3d Dist. 1970).

526. *Byrd v. Leach*, 226 So.2d 866, 868 (Fla. 4th Dist. 1969).

527. FLA. R. Civ. P. 1.510(e). In *Ferris v. Nichols*, 245 So.2d 660 (Fla. 4th Dist. 1971), an affidavit was invalidated because a note referred to by the affidavit was not attached to it, and there was not a sufficient reference in the affidavit to identify the note.

528. *Hurricane Boats, Inc. v. Certified Indus. Fab., Inc.*, 246 So.2d 174, 175 (Fla. 3d Dist. 1971).

529. *Id.* In this case, the affidavit was disapproved for three reasons: first, it did not state that it was made with personal knowledge; second, it did not set forth evidentiary facts which would be admissible in evidence; and third, there was no statement contained within it which indicated the competency of the affiant to testify on the points embraced in the affidavit.

See also *Orthwein v. Cobbs Fruit & Preserving Co.*, 229 So.2d 607 (Fla. 1st Dist. 1969) (affidavit based upon "information and belief" insufficient); *P & T Elec. Co. v. Spadea*, 227 So.2d 234 (Fla. 4th Dist. 1969), *cert. discharged*, 235 So.2d 510 (Fla. 1970) (affidavit based upon "best information and belief" insufficient).

A statement that an affidavit was made on personal knowledge is not always necessary, however. In *United Bonding Insurance Co. v. Dura-Stress, Inc.*,<sup>530</sup> a corporate officer had executed an affidavit for his employer-corporation in support of a motion for summary judgment which did not contain the "personal knowledge" language. On appeal from summary final judgment, the District Court of Appeal, Second District, rejected the appellant's contention that the affidavit was insufficient because it did not state that it was made on affiant's personal knowledge and did not delineate the sources of information.

While it is true that the affidavit in question did not specifically state that it was made on personal knowledge, the facts were stated positively, and not merely as a matter of belief, or "to the best of affiant's knowledge and belief." . . . It is generally held that when an officer of a corporation makes an affidavit in its behalf, it is not necessary that he should state the sources of his knowledge, or information and belief. . . . An officer must be possessed of the requisite knowledge, but such knowledge on his part is presumed.<sup>531</sup>

An affidavit can take many forms. For instance, in *Avampato v. Markus*,<sup>532</sup> the court had before it an affidavit in deposition form. It contained a series of leading and suggestive questions posed by the defendant's counsel which were affirmed or denied by the defendant-affiant. The District Court of Appeal, Fourth District, noted the unusual form of the affidavit, but held that the affidavit was "no more [or] less reliable than an affidavit written in narrative form, usually by counsel, which is then read and sworn to by the party whose statement it purports to be."<sup>533</sup>

In addition, pursuant to rule 1.510(e), affidavits may be supplemented. This provision was interpreted by the District Court of Appeal, Fourth District, in *Ferris v. Nichols*,<sup>534</sup> to permit the use of a previously filed deposition in a later summary judgment hearing. In *Ferris*, a plaintiff had filed a motion for summary judgment and a supporting affidavit. The motion was denied, but several months later, the plaintiff filed another supplemental affidavit, and the court granted summary final judgment relying on both affidavits. The Fourth District found no fault in this procedure and held that it was acceptable to rely both on the earlier document and its later supplementation since each of the affidavits had been filed at least 20 days prior to the hearing on the motion.

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530. 243 So.2d 244 (Fla. 2d Dist. 1971).

531. *Id.* at 246.

532. 245 So.2d 676 (Fla. 4th Dist. 1971).

533. *Id.* at 678 (summary judgment reversed on other grounds). See notes 511-12 *supra* and accompanying text.

534. 245 So.2d 660 (Fla. 4th Dist. 1971) [hereinafter cited as *Ferris*].

## XIII. MOTIONS FOR NEW TRIAL AND REHEARING

A. *Motions for New Trial*

## 1. IN GENERAL

The Florida Rules of Civil Procedure provide that a judge in a jury action may grant a motion for new trial on some or all of the issues tried. Likewise, in a non-jury action, the judge may open the final judgment, take additional testimony, and enter a new final judgment. Both of these provisions are conditioned upon action being taken within 10 days of the entry of final judgment.<sup>535</sup>

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535. FLA. R. CIV. P. 1.530.

Exactly what constitutes a final judgment often poses problems. For instance, in *Conboy v. City of Naples*, 226 So.2d 108 (Fla. 2d Dist. 1969), *cert. denied*, 234 So.2d 117 (Fla. 1969), 400 U.S. 825 (1970), a class action was brought by a taxpayer against two corporations (among others) which allegedly were not bearing their fair share of the tax burden. Between the second and third day of trial (divided by a two month hiatus), one of the defendants moved for and was granted a directed verdict. The trial then continued as to the other defendant, and six months later a final judgment was entered in favor of the remaining defendants. The plaintiff took an appeal against all the defendants, and the defendant which had been victorious early in the litigation argued that final judgment as far as it was concerned had occurred at the time the verdict was directed in its favor, irrespective of that date of final judgment against the other defendants. The District Court of Appeal, Second District, agreed with the disgruntled defendant and noted that:

The general rule is that where suit is against several defendants, *jointly* liable, disposition of the cause as to some of them with no determination as to the others is not final . . . . However, as was approved by the Supreme Court of Florida in the Hillsboro Plantation case, *supra*, "a judgment affecting one but not all of multiple defendants where the claim adjudicated is separable from and collateral to rights asserted in the action" the judgment is final.

*Id.* at 110, *citing* Hillsboro Plantation v. Plunkett, 55 So.2d 534, 535 (Fla. 1951) [hereinafter cited as *Hillsboro*].

In another case touching upon *Hillsboro*, the Supreme Court of Florida overturned a District Court of Appeal, Second District, order dismissing an appeal as not timely filed. *Rice v. Doyle*, 232 So.2d 163 (Fla. 1970), *rev'g* 223 So.2d 783 (Fla. 2d Dist. 1969) [hereinafter cited as *Rice*]. In *Rice*, a plaintiff had instituted an action against two codefendants for personal injuries arising out of an automobile mishap. The plaintiff was granted a partial summary judgment on liability, and after a trial on damages was conducted, final judgment was entered. One of the codefendants moved for a new trial, but the trial court denied the motion. Within 30 days after the denial of codefendant Booker's motion, codefendant Rice filed notice of appeal. The Second District held that her appeal time ran from the date of the rendition of the final judgment, not from the date of the denial of the new trial motion. The supreme court disagreed.

In order to properly reason that the definition of "final" judgment as set forth in the Hillsboro Plantation case applies under the present facts to warrant a similar designation of the instant judgment insofar as it pertains to Petitioner, it must first be demonstrated that the motion for new trial filed by Petitioner's codefendant did not raise any issues which could possibly affect the result of the litigation as between Petitioner and Respondent.

In the present case, by virtue of codefendant Booker's motion for new trial, the trial court was charged with the task of testing the verdict against the sufficiency of the evidence. Discharge of this task could have entailed ascertaining whether the damages awarded were supported by the evidence, a judicial consideration which under the verdict and judgment here involved necessarily would affect the litigation as it related to all the parties. Thus, in the present case, we do not have a situation where the litigation as between Petitioner and Respondent is placed in repose and thereby rendered immune to any future judicial labor of the trial court acting on the motion for new trial. Accordingly, the motion for new trial filed by codefendant Booker destroyed the finality of the judgment . . . both

The three most prevalent grounds for a new trial in a jury action are: first, the verdict was contrary to the law or weight of the evidence,<sup>536</sup> second, the jury was improperly influenced for one reason or another during the course of the litigation;<sup>537</sup> and third, the damage verdict was inadequate or insufficient.<sup>538</sup> For a court to grant a new trial on the first ground, "requires more than a cursory disposition . . . that 'the verdict is contrary to the evidence.'"<sup>539</sup> The order granting the new trial must set forth the grounds giving rise to its order with specificity, or they must clearly appear from the record.

Likewise, it is not sufficient for a trial judge who grants a new trial on the grounds of improper jury considerations to find that "the verdict reached by the jury in the light of the evidence clearly indicates . . ." improper influences.<sup>540</sup> Such a finding is merely the opinion of the court and will not be afforded any weight on appeal. Of course,

[a] new trial may be required under certain circumstances as a matter of public policy for the purpose of maintaining confidence in the integrity of jury trials, but such relief will ordinarily be denied where the act or conduct complained of does not, in the opinion of the trial court, threaten the integrity of the jury or verdict or public confidence in trial by jury in any serious sense.<sup>541</sup>

as to Booker and Petitioner and said judgment was not appealable by any of the parties until disposition of the motion for new trial.

*Id.* at 165. As regards the possibility that a defendant, satisfied with the judgment, might be unfairly prejudiced by having to wait for the end to a codefendant's exercise of rights under rules 1.530 and 1.540 the, supreme court added:

We do not foresee that by constructing such a judgment as not final for purpose of appeal we have in any way jeopardized the prerogative of a nonmoving defendant party to accept satisfaction of a judgment. Such a party could easily inform the trial court of his satisfaction with the prior judgment and his desire not to join in the motion for new trial. Under F.R.C.P. 1.530(a), 31 F.S.A. the trial court is empowered to grant a new trial to all or any of the parties and on all or a part of the issues. A motion to invoke the authority conferred under this rule would in most cases suffice to protect the exercise of such a privilege by a satisfied party.

*Id.*

536. See generally *Hodge v. Jacksonville Terminal Co.*, 234 So.2d 645 (Fla. 1970) [*cert. denied*, 400 U.S. 904 (1971)], *rev'g in part* 222 So.2d 483 (Fla. 1st Dist. 1969); *Archer—Daniels—Midland Co. v. A & P Bakery Sup. & Equip. Co.*, 240 So.2d 73 (Fla. 3d Dist. 1970), *cert. denied*, 244 So.2d 432 (Fla. 1971); *Fletcher Co. v. Melroe Mfg. Co.*, 238 So.2d 142 (Fla. 1st Dist. 1970), *cert. denied*, 242 So.2d 463 (Fla. 1970); *Ratner v. Pressman*, 235 So.2d 547 (Fla. 3d Dist. 1970).

537. See notes 540-43 *infra* and accompanying text.

538. See notes 544-61 *infra* and accompanying text.

539. *Hodge v. Jacksonville Terminal Co.*, 234 So.2d 645, 647 (Fla. 1970) [*cert. denied*, 400 U.S. 904 (1971)], *rev'g in part*, 222 So.2d 483 (Fla. 1st Dist. 1969); *citing* *Cloud v. Fallis*, 110 So.2d 669 (Fla. 1959), *aff'g* 107 So.2d 264 (Fla. 2d Dist. 1958). The supreme court in this case disapproved of the court's approach of assuming proper grounds by the trial court when they were not stated in the order nor demonstrated in the record.

540. *Sutton v. Gomez*, 234 So.2d 725, 727 (Fla. 2d Dist. 1970).

541. *Snelling v. Florida E. Coast Ry.*, 236 So.2d 465, 466 (Fla. 1st Dist. 1970). See also (for the same identical opinion) *Flowers v. Florida E. Coast Ry.*, 237 So.2d 803 (Fla. 1st Dist. 1970); *Wood v. Florida E. Coast Ry.*, 237 So.2d 801 (Fla. 1st Dist. 1970); *Shad v. Florida E. Coast Ry.*, 236 So.2d 477 (Fla. 1st Dist. 1970).

Thus, a trial judge did not act improperly in refusing to grant a new trial where two jurors drove past an accident site, but claimed that they did not do so to get a better insight into a case, and where another juror was found to have lied when asked on voir dire if he had any relatives who were employed by insurance companies.<sup>542</sup> Thus, it can be seen that to justify the granting of a new trial on the grounds of improper jury influence, it is necessary to demonstrate that there were improprieties giving rise to the undue influence, and that there was sufficient prejudice caused to warrant this remedy.<sup>543</sup>

## 2. ADEQUACY OF THE VERDICT

One area which clearly merges the rules regarding verdicts based upon improper jury influence and verdicts against the manifest weight of the evidence is an attack on the adequacy of a jury's award. In *Griffis v. Hill*,<sup>544</sup> the Supreme Court of Florida reviewed four prior decisions touching upon the granting of a new trial because of an inadequate award of damages.<sup>545</sup> In one of these cases, *Shaw v. Puleo*,<sup>546</sup> the court had formulated a test which required a showing that

the verdict was induced by prejudice or passion, some misconception of the law or the evidence or . . . that the jury did not consider all of the elements of damage involved, missed a consideration of the issues submitted or failed to discharge their duty as given them by the court's charge.<sup>547</sup>

Six months later in *City of Miami v. Smith*,<sup>548</sup> the supreme court reiterated the language of *Puleo* and quashed a district court of appeal ruling which had held that it was unreasonable to assume that a jury had considered damages for pain and suffering when the verdict returned was the exact amount of the medical expenses claimed. The court held that "absent a

542. *Snelling v. Florida E. Coast Ry.*, 236 So.2d 465 (Fla. 1st Dist. 1970).

543. An improper jury instruction regarding the law, when recognized by a judge, may be sufficient to warrant the granting of a new trial. Such an error fulfills the requisites of the law as set forth in *Cloud v. Fallis*, 110 So.2d 669 (Fla. 1959), *aff'g* 107 So.2d 264 (Fla. 2d Dist. 1958): first, that the jury did not reach a substantially just conclusion; and second, that it appeared to the judge from first hand observation of the jury and witnesses that the jury was influenced by erroneous considerations. See *Pepin v. Retail Disc. Ass'n, Inc.*, 226 So.2d 145 (Fla. 1st Dist. 1969). See also *Webster v. Harmon*, 240 So.2d 69, 70 (Fla. 4th 1970), *cert. denied*, 245 So.2d 631 (Fla. 1971), where the court stated that "[a] motion for new trial may be granted where it is shown that the jury misconceived the law or the evidence or did not consider all elements of damage."

544. 230 So.2d 143 (Fla. 1970), *quashing* 217 So.2d 358 (Fla. 1st Dist. 1969) [hereinafter cited as *Griffis*].

545. *Roberts v. Bushore*, 182 So.2d 401 (Fla. 1966); *Hayes v. Hatchell*, 166 So.2d 146 (Fla. 1964); *City of Miami v. Smith*, 165 So.2d 748 (Fla. 1964); and *Shaw v. Puleo*, 159 So.2d 641 (Fla. 1964).

546. 159 So.2d 641 (Fla. 1964) [hereinafter cited as *Puleo*].

547. *Id.* at 644, *citing* *Radiant Oil Co. v. Herring*, 146 Fla. 154, 157, 200 So. 376, 378 (1941).

548. 165 So.2d 748 (Fla. 1964) [hereinafter cited as *Smith*].

showing of vitiating circumstances such as were enumerated in the Radiant Oil case [set forth in *Puleo*], . . . we must assume that the jury considered all elements of damage."<sup>549</sup> Thus, the trial court's refusal to grant a new trial was affirmed. Two weeks later, in a per curiam opinion, the court reaffirmed its holding in *Smith*.<sup>550</sup>

In 1966, the supreme court appeared to modify its position on the question, when it stated:

Our decisions in the three cases [*Puleo*, *Smith* and *Hayes*] were not intended to indirectly preclude a review by the District Courts of verdicts challenged for inadequacy. We reiterate that a verdict for grossly inadequate damages stands on the same ground as a verdict for excessive or extravagant damages and that a new trial may be as readily granted in the one case as the other. Moreover, we did not mean by the language employed in any of our prior decisions or the results therein that neither the trial court nor the District Court is precluded from disturbing a verdict which as an end result is so grossly inadequate that it shocks the conscience of the Court.<sup>551</sup>

However, on remand, the District Court of Appeal, First District, stated that it had re-examined the evidence in light of the high court's mandate, but reaffirmed its decision on the grounds that "so long as the decisions of the Supreme Court in . . . [*Puleo*, *Smith* and *Hayes*] remain the law of the land, the judgment appealed in this case must be affirmed."<sup>552</sup>

To relieve the confusion caused by *Roberts* and its previous three decisions, the court handed down *Griffis*, wherein a District Court of Appeal, First District, ruling which denied a new trial motion on the grounds of adequacy of damages was reversed on the authority of *Smith* and *Puleo*.<sup>553</sup>

The test to be applied in determining the adequacy of a verdict is whether a jury of reasonable men could have returned that verdict. This test is simply stated but may be difficult to apply in a particular case. We are aware of the difficulties and frustrations courts experience in the search for the mythical jury of reasonable men. The appellate court must be ever alert against the temptation to substitute its "verdict" for that of the jury. On the other hand, we must not refuse to act to relieve the injustice of either a grossly inadequate or excessive verdict.

To the extent that this Court's decision in *Roberts* or our holding herein are inconsistent with the decisions in *Shaw*, *Hayes* and *Smith*, these latter decisions are modified.<sup>554</sup>

549. *Id.* at 750.

550. *Hayes v. Hatchell*, 166 So.2d 146 (Fla. 1964) [hereinafter cited as *Hayes*].

551. *Roberts v. Bushore*, 182 So.2d 401, 402 (Fla. 1966) [hereinafter cited as *Roberts*].

552. *Roberts v. Bushore*, 183 So.2d 708, 711 (Fla. 1st Dist. 1966).

553. *Griffis v. Hill*, 230 So.2d 143 (Fla. 1969), *quashing* 217 So.2d 358 (Fla. 1st Dist. 1968).

554. *Id.* at 145. See *Sebold v. Bushman*, 230 So.2d 198 (Fla. 4th Dist. 1970), which reiterated this rule.



The test of reasonableness, though, often poses a problem. It is clear, for instance, that a jury does not have to return a verdict which reflects the total amount requested by a plaintiff, but "there must be some rationale in the amount assessed by the jury . . . ." <sup>555</sup> Consequently, where a jury was instructed that the measure of damages in an action, if granted, would be the difference between the value of property immediately before and immediately after a fire, and uncontroverted testimony was presented which set those two figures at \$25,000-26,000 and \$10,000 respectively and established other damage in the amount of \$7,000, there could be no rationale basis to support a verdict of \$8,500 returned by a jury. <sup>556</sup>

When a judge grants a new trial because of an excessive verdict, a party contesting that determination on appeal has the burden of overcoming a strong presumption that the judge was correct. Indeed, to meet this burden, it must be demonstrated from the record "that the trial judge greatly abused his discretion." <sup>557</sup> However, "the trial judge does not sit as a seventh juror with veto power." <sup>558</sup> In *Laskey v. Smith*, <sup>559</sup> a trial judge had given a party the alternative of accepting a remittitur of \$21,200 or a new trial in a wrongful death action of an infant. The District Court of Appeal, Fourth District, rejected this alternative and reinstated the verdict. <sup>560</sup> On certiorari review, the supreme court affirmed.

A jury's determination of damage is reviewable by the trial judge on precisely the same principles as govern his superintendence of determinations of liability. . . . The record must affirmatively show the impropriety of the verdict or there must be an independent determination by the trial judge that the jury was influenced by considerations outside the record.

. . . His setting aside a verdict must be supported by the record, as in *Cloud v. Fallis*, Fla. 1959, 110 So.2d 669, or by findings reasonably amenable to judicial review. Not every ver-

555. *Dybalski v. Nichols*, 227 So.2d 510, 512 (Fla. 1st Dist. 1969).

556. The plaintiff's evidence was not even questioned by the defendants insofar as the reasonableness of the repairs—the costs thereof, or the necessity therefor. . . . Therefore, the jury had only the testimony of the plaintiffs and their building contractor to fix the value of damages. While it is true that a jury does not have to assess damages in the total prayed for or testified to by the plaintiff, there must be some rationale in the amount assessed by the jury and where it appears that the jury not only believed the plaintiff's claims to be inaccurate and excessive, but so completely disregarded all the uncontroverted testimony as to actual damage, it brings us to the conclusion that the verdict must have been the result of mistake, misapprehension, or some other reason de hors the evidence.

*Id.* at 512. The trial court's order denying a motion for a new trial was subsequently quashed, and the cause remanded for a new trial on the question of damages only.

557. *Materials of Miami, Inc. v. Matthews*, 227 So.2d 524, 525 (Fla. 3d Dist. 1969), *cert. denied*, 237 So.2d 178 (Fla. 1970). In this case, the trial judge found that the evidence relating to damages was speculative.

558. *Laskey v. Smith*, 239 So.2d 13, 14 (Fla. 1970), *aff'g* 222 So.2d 773 (Fla. 4th Dist. 1969).

559. 239 So.2d 13 (Fla. 1970), *aff'g* 222 So.2d 773 (Fla. 4th Dist. 1969).

560. *Smith v. Laskey*, 222 So.2d 773 (Fla. 4th Dist. 1969).

dict which raises a judicial eyebrow should shock the judicial conscience.

In its movement toward constancy of principle, the law must permit a reasonable latitude for inconstancy of result in the performance of juries. The trial judge's review of that performance is likewise sustainable within a broad range provided that the record or findings of influence outside it support his determination.<sup>561</sup>

### 3. JUDICIAL DISCRETION

A motion for new trial, if granted, is immediately reviewable by appeal without waiting until the rendition of a final judgment.<sup>562</sup> However, "[i]t is a long settled rule that the discretion allowed . . . a trial judge in the granting of new trials is a very broad and liberal one."<sup>563</sup> The appellate courts, though, may review the record, "for the purpose of ascertaining whether the exercise of judicial discretion . . . has been abused."<sup>564</sup> If there has been an abuse, the appellate court will set the order aside. This same exercise of discretion is afforded a court when it reopens a case to allow additional testimony and other evidence to be presented.<sup>565</sup> On the other hand, when a new trial is granted, and a question of law is involved, the breadth of judicial discretion is not as broad. In fact, in the words of the District Court of Appeal, Fourth District, it is "drastically reduced."<sup>566</sup>

561. *Laskey v. Smith*, 239 So.2d 13, 14 (Fla. 1970).

562. Fla. Laws 1971, ch. 71-316, *amending* FLA. STAT. § 59.04 (1969).

563. *Ratner v. Pressman*, 235 So.2d 547, 548 (Fla. 3d Dist. 1970) (per curiam). *See Fletcher Co. v. Melroe Mfg. Co.*, 238 So.2d 142 (Fla. 1st Dist. 1970), *cert. denied*, 242 So.2d 463 (Fla. 1970); *Stopko v. Farrington*, 235 So.2d 28 (Fla. 4th Dist. 1970); *Kowalski v. Wilder*, 233 So.2d 159 (Fla. 3d Dist. 1970).

564. *Stopko v. Farrington*, 235 So.2d 28, 29 (Fla. 4th Dist. 1970), *quoting* *Russo v. Clark*, 147 So.2d 1 (Fla. 1962).

565. *See, e.g., Hudson Pulp & Paper Corp. v. Futch*, 232 So.2d 763 (Fla. 1st Dist. 1969).

566. *Smith v. Montgomery Ward & Co.*, 232 So.2d 195, 197 (Fla. 4th Dist. 1970). *See Wheeler v. Nelson*, 229 So.2d 11 (Fla. 2d Dist. 1969), *cert. denied*, 237 So.2d 533 (Fla. 1970). *See also Archer—Daniels—Midland Co. v. A & P Bakery Sup. & Equip. Co.*, 240 So.2d 73, 75 (Fla. 3d Dist. 1970), *cert. denied*, 244 So.2d 432 (Fla. 1971), where it was stated:

Appellate courts are reluctant to reverse orders granting new trials. Nevertheless, as pointed out in *Nunberg v. Brodsky*, . . . there is a difference between cases in which the trial court grants a new trial because of a finding that the verdict is against the manifest weight of the evidence and those cases in which the trial court finds that it must grant a new trial because of an error it considers it has made. In the first instance the trial court is acting upon an evidentiary question, in the second, the question is one of law. The function of a motion for new trial where a party claims it was aggrieved by the rulings of the trial court is to furnish an opportunity for the trial court to correct its own errors, if any. . . . Implicit in this rule is the rule that a new trial should not be granted on the basis of a ruling which was free from error.

In that case, a trial judge had refused a motion for continuance (*See* notes 454-55 *supra* and accompanying text), and after trial had granted a new trial motion because of an error the judge saw in his denial of the continuance. The appellate court found the denial of the continuance proper and struck down the new trial order.

Generally speaking, "[a] stronger showing is required to reverse an order granting a new trial than to reverse one denying it."<sup>567</sup> But, the rules prescribing time limits under rule 1.530 are strictly observed, and a court may not grant a new trial after the 10 day period has run for filing such motions.<sup>568</sup>

### B. *Motions for Rehearing*

In non-jury actions, upon a motion for rehearing, a judge may open the final judgment under certain circumstances.<sup>569</sup> In *Scott v. Cummings*,<sup>570</sup> an assault and battery action, the trial judge entered a final judgment in the amount of \$960.00, but later increased it to \$4,000.00 on the grounds that he had failed to consider pain and suffering in setting the judgment. On appeal, the appellant claimed that the court could not open a judgment pursuant to rule 1.530(a) unless additional testimony was taken. The District Court of Appeal, First District, affirmed the trial judge's action and cited the following rule:

"In a court action . . . there will be many times when proper relief may be accorded by something far less than actual new trial, such as the taking of additional testimony, the amendment of the findings of fact, conclusions of law, or the judgment."<sup>571</sup>

However, this provision encompassed only permanent judgments entered by the court and not interlocutory orders. Thus, a motion for rehearing directed to the denial of a motion to dismiss for improper venue is not authorized by the rules of practice, and the filing of such a motion will consequently be insufficient to toll the time period for an interlocutory appeal.<sup>572</sup>

An order entering final summary judgment in an action cannot be reviewed after ten days have passed according to a recent case decided by the Supreme Court of Florida. In *Shelby Mutual Insurance Co. v. Pearson*,<sup>573</sup> an insured had brought action against his insurer for an alleged breach of duty to exercise good faith. The defendant insurer filed for and was granted summary final judgment, and the plaintiff filed a timely motion for rehearing pursuant to rule 1.530(a). Three days later the court denied plaintiff's petition. Thirty-two days after the entry of final judgment, the plaintiff filed a "Motion for Reconsideration" petitioning the court to reconsider the merits of the petition for rehearing. Eleven days later the court set aside its final order and its order denying plaintiff's petition for rehearing and reinstated the action. In order to protect his

567. *Wheeler v. Nelson*, 229 So.2d 11, 12 (Fla. 2d Dist. 1969), cert. denied, 237 So.2d 533 (Fla. 1970). See also *Zabner v. Howard Johnson's Inc.*, 227 So.2d 543 (Fla. 4th Dist. 1969).

568. See, e.g., *Allen v. Allen*, 230 So.2d 29 (Fla. 1st Dist. 1969).

569. FLA. R. CIV. P. 1.530(a).

570. 238 So.2d 449 (Fla. 1st Dist. 1970).

571. *Id.* at 450, quoting *Pensacola Chrysler-Plymouth, Inc. v. Costa*, 195 So.2d 250, 253 (Fla. 1st Dist. 1967) (emphasis added).

572. *Home News Pub. Co. v. U-M Pub. Co.*, 246 So.2d 117 (Fla. 1st Dist. 1971).

573. 236 So.2d 1 (Fla. 1970).

interests in the event the trial court's order was invalid, the plaintiff filed a timely "Notice of Appeal from the Summary Final Judgment" and from the denial of the petition for rehearing. Assignments and cross-assignments of error were filed by both parties. Plaintiff then filed a "Suggestion of Lack of Jurisdiction," which claimed that the district court of appeal was without jurisdiction to consider the case since final judgment had been set aside. The District Court of Appeal, Third District, subsequently dismissed the appeal<sup>574</sup> in purported reliance upon *Floyd v. State ex rel. La Vigne Electric Co.*<sup>575</sup>

On petition for writ of mandamus to reinstate the appeal, the supreme court reversed the dismissal and ordered the Third District to quash the trial court's order reinstating the plaintiff's action and to consider plaintiff's appeal from summary final judgment for proper disposition. The supreme court held that the Third District had incorrectly relied on *Floyd* since that decision had been handed down prior to the adoption of a rule for reconsideration of the entry of summary final judgments. Now, according to the court, there are specific provisions under rule 1.530 "for correction of error by the trial court . . . within ten days after rendition of judgment or order. Unless a proper motion or petition is filed within the allotted time, the judgment or order of the trial court becomes absolute."<sup>576</sup> Thus, the trial court loses jurisdiction over the cause after that period has run in the absence of a timely filed motion. In so holding, the high court expressly rejected the plaintiff's contention that the trial court retained jurisdiction until the time for filing a Notice of Appeal had run.<sup>577</sup> Thus, it is clear that reconsideration of summary final judgments is governed by the provisions of rule 1.530, and that after the 10 day period for filing of petitions for rehearing have run, the trial court irrevocably loses jurisdiction over the action.

#### XIV. RELIEF FROM JUDGMENTS, DECREES, OR ORDERS

##### A. Clerical Mistakes of the Court

Rule 1.540 provides for relief from final judgments, decrees, or orders caused by oversights by the court<sup>578</sup> (or by the parties).<sup>579</sup> Errors made

574. *Cloud v. Shelby Mutual Ins. Co.*, 227 So.2d 911 (Fla. 3d Dist. 1969).

575. 139 So.2d 873 (Fla. 1962) [hereinafter cited as *Floyd*].

576. *Shelby Mutual Ins. Co. v. Pearson*, 236 So.2d 1, 3 (Fla. 1970). The period of time set forth by FLA. R. Civ. P. 1.530 is ten days from entry of the final order. It should be noted that the court specifically denied that FLA. R. Civ. P. 1.540 applied in this case, and that the longer periods for modification (in some cases, up to one year) did not apply.

No argument has been made that the trial court here has acted on the "Motion for Re-consideration" under the provision of Florida Rule of Civil Procedure 1.540, allowing relief from judgments, decree or orders for clerical mistakes or other reasons listed in Section "b" thereof. Indeed this rule was not intended to cover the situation at bar where the trial court reconsidered the legal propriety of the previously entered summary judgment.

*Id.* at 4.

577. "The argument that the time in which an appeal must be taken has anything to do with the jurisdiction of the trial court is without merit." *Id.*

578. FLA. R. Civ. P. 1.540(a).

579. FLA. R. Civ. P. 1.540(b). See section XIV, B, *infra*.

by the court, pursuant to rule 1.540(a), "may be corrected . . . at any time on its own initiative or on the motion of any party . . ." If an appeal has been taken, though, the court may only act until such time as the appeal record is docketed with the appellate tribunal at which time the appeals court acquires sole jurisdiction for such review.<sup>580</sup>

The root evil that rule 1.540(a) is directed towards is mistake. But, as the District Court of Appeal, Second District, noted in *Fatolitis v. Fatolitis*,<sup>581</sup> only a clerical mistake is reviewable under 1.540(a) and not a mistake of law.<sup>582</sup> In *Fatolitis*, a court had dismissed with prejudice a plaintiff's complaint for divorce and dismissed without prejudice the defendant's counterclaim for separate maintenance. In its final order, though, the court inadvertently failed to retain jurisdiction over the parties for the purpose of awarding attorney's fees to the defendant. Two months later, on defendant's motion, the court reopened the case and awarded attorney's fees to the defendant. In so doing, the court rejected plaintiff's motion to strike and based its ruling upon the fact that inadvertence had caused the court to lose jurisdiction; that the court had intended to award attorney's fees later; and that the parties were aware at the time of the entry of the dismissal of the court's intention to do so. The Second District approved this correction under the authority of rule 1.540(a). One month later, that same court approved a similar correction where a trial judge mistakenly dismissed one of two consolidated actions, even though the reinstatement of the dismissed action was effected more than two years later.<sup>583</sup>

### B. "Mistakes" of the Parties

Rule 1.540(b)(1)-(3) provides that a judgment may be set aside within one year because of "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; [and] (3) fraud (whether . . . intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party . . ." No time limit, though, will bar a court from setting aside a judgment which is void; "has been satisfied, released or discharged . . .;" or is based upon a prior decree or judgment which has been reversed, or otherwise vacated, or can no longer be held to be prospectively equitable.<sup>584</sup>

The filing of a rule 1.540(b) motion will not suspend or affect the finality of a previously entered final judgment, and the existence of the remedy does not deprive any court from entertaining "an independent

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580. FLA. R. CIV. P. 1.540(a).

581. 247 So.2d 525 (Fla. 2d Dist. 1971).

582. A mistake of law is not correctable pursuant to FLA. R. CIV. P. 1.540(a). See *Constant v. Tillitson*, 214 So.2d 91, 93 (Fla. 1st Dist. 1968), cited in *Fatolitis v. Fatolitis*, 247 So.2d 525, 525-526 (Fla. 2d Dist. 1971).

583. *State ex rel. Florida Dept. of Transportation v. Hall*, 247 So.2d 777 (Fla. 2d Dist. 1971).

584. FLA. R. CIV. P. 1.540(b)(4)-(5).

action to relieve a party from a judgment, decree, order or proceeding or to set aside a judgment or decree for fraud upon the court."<sup>585</sup> A trial court may not, however, set aside a summary final judgment pursuant to any provision of rule 1.540(b) after a hearing has been held and disposed of under the provisions of rule 1.530.<sup>586</sup>

In determining a motion to set aside a judgment, both questions of law and fact arise. It has been suggested that the factual questions presented by such motions ought to be submitted to a jury for determination. In two recent cases, though, the District Court of Appeal, Third District, has flatly rejected that contention.<sup>587</sup> In *Fagan v. Powell*,<sup>588</sup> the appellant argued that since rule 1.540 was a substitute for the common law writ of coram nobis which provided for jury determination of factual issues, and since this "right existed at the time of the adoption of the Constitution of the State of Florida, it . . . [could not] be abrogated by the portion of Rule 1.540(b) that abolishes writs of coram nobis."<sup>589</sup>

After reviewing and distinguishing three decisions from other jurisdictions which were cited by the appellants as standing for the position they espoused,<sup>590</sup> the Third District disagreed with the fourth case cited, an Arizona decision.<sup>591</sup> The court held that there was no right to a jury determination of the factual issues presented in a motion to set aside a judgment pursuant to rule 1.540; the factual findings were to be made only by the court. Three reasons were furnished as supporting this holding: (1) "trying by jury the factual issues raised by a motion to vacate has unsatisfactory results and should be avoided because it would introduce needless confusion and uncertainty . . . ;"<sup>592</sup> (2) the very language of rule 1.540(b) indicates that such factual determinations are solely within the court's province,<sup>593</sup> and (3)

the rule that relief under Rule 1.540 is to be granted at the discretion of the court and cannot be invoked as a matter of right [citations omitted] is an implied declaration that it would be an

585. FLA. R. CIV. P. 1.540(b).

586. See notes 573-77 *supra*, authorities cited therein, and accompanying text.

587. *Fagan v. Powell*, 237 So.2d 579 (Fla. 3d Dist.), *appeal dismissed*, 239 So.2d 826 (Fla. 1970), See also *Outler v. Berman*, 234 So.2d 724 (Fla. 3d Dist.), *cert. denied*, 238 So.2d 430 (Fla. 1970).

588. 237 So.2d 579 (Fla. 3d Dist. 1970).

589. *Id.* at 580-81. FLA. R. CIV. P. 1.540(b) provides that "[w]rits of coram nobis . . . are abolished and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action."

590. See *Fagan v. Powell*, 237 So.2d 579, 581 (Fla. 3d Dist. 1970).

591. *Preston v. Denkins*, 94 Ariz. 214, 382 P.2d 686 (1963) (right to have a jury determination of factual issues in an equitable action to vacate a judgment). The Third District did not pass on the question of an equitable action to vacate a judgment, but rather rejected the Arizona court's reasoning as it might be applied to the facts in *Fagan*. See *Fagan v. Powell*, 237 So.2d 579, 581 (Fla. 3d Dist. 1970).

592. *Id.*, citing 7 J. MOORE, FEDERAL PRACTICE ¶ 60.28[3], at 329 (2d ed. 1970).

593. "On motion and upon such terms as are just, the court may relieve a party \* \* \* from a final judgment \* \* \*." *Fagan v. Powell*, 237 So.2d 579, 581 (Fla. 3d Dist. 1970), citing FLA. R. CIV. P. 1.540(b) (emphasis supplied by court).

improper infringement of a court's power to require the court to have a jury resolve the factual issues raised by a motion for relief and, in effect, have the jury determine whether the movant is entitled to relief.<sup>594</sup>

After a court has ruled on both the factual and legal questions involved in a rule 1.540 motion and entered an order, the proper avenue of review is by direct appeal and *not* by writ of certiorari.<sup>595</sup> However, such an appeal will be limited to a review only of the propriety of the denial of the motion.<sup>596</sup> Consequently, the appeal of an unfavorable rule 1.540 order cannot be used to attack a judgment itself in an attempt to cure a failure to timely file an appeal after final judgment.

As a general rule, once a plaintiff voluntarily dismisses an action, the court loses jurisdiction of the case,<sup>597</sup> and a defendant is thus powerless to attack that dismissal by resort to rule 1.540. However, in a suit involving multiple defendants with a voluntary dismissal entered against fewer than all, the District Court of Appeal, Third District, has suggested that a court may have the power to set aside a dismissal through a procedural maneuver.<sup>598</sup>

In *Cooper v. Carroll*,<sup>599</sup> the Third District was reviewing a lower court case where a plaintiff had filed a notice of dismissal against all defendants pursuant to rule 1.420(a). Shortly afterwards, however, the plaintiff successfully moved the trial court to set aside his notice of voluntary dismissal and allow the filing of an amended notice of dismissal against only one of the defendants. On appeal, as previously discussed,<sup>600</sup> the Third District held that rule 1.540 applied to a "proceeding," and that a voluntary dismissal was a proceeding contemplated under the rule. (In so holding, the Third District set down a rule at variance with a later decision of the District Court of Appeal, Fourth District).<sup>601</sup>

In addition, however, Judge Carroll, speaking for a unanimous court,

594. *Fagan v. Powell*, 237 So.2d 579, 581 (Fla. 3d Dist. 1970). The court disposed of the appellant's argument regarding coram nobis when it stated:

The clear language of Rule 1.540 shows it is not a substitute for anything but is a new and radical change in the procedure which the court may upon the proof of certain facts to its satisfaction vacate its own judgment. The fact that the rule abolished the writ of error coram nobis as a means for obtaining the relief outlined in Rule 1.540 does not constitute the rule a substitute for the writ.

*Id.*

595. *Bland v. Mitchell*, 245 So.2d 47 (Fla.), *aff'g* 231 So.2d 224 (Fla. 4th Dist. 1970); *approving* *Rogers v. First National Bank*, 223 So.2d 365 (Fla. 4th Dist. 1969); *Frank v. Amara*, 235 So.2d 537 (Fla. 1st Dist. 1970), *overruling in part* *Bursten v. Cooper*, 127 So.2d 134 (Fla. 3d Dist. 1961). *See also* *Reizen v. Florida National Bank*, 237 So.2d 30 (Fla. 1st Dist. 1970). According to *Bland*, FLA. R. APP. P. 4.2(a) compels this conclusion.

596. *Bland v. Mitchell*, 245 So.2d 47 (Fla. 1970).

597. *See* section VIII, A, *supra*.

598. *See* *Cooper v. Carroll*, 239 So.2d 511 (Fla. 3d Dist. 1970). *See also* notes 422-24 *supra* and accompanying text.

599. 239 So.2d 511 (Fla. 3d Dist. 1970).

600. *See* note 422 *supra* and accompanying text.

601. *Rich Motors, Inc. v. Loyd Cole Produce Express, Inc.*, 244 So.2d 526 (Fla. 4th Dist. 1970). *See* notes 419-421 *supra* and accompanying text.

held that "the rule relating to dismissal by notice filed by a plaintiff refers to dismissal of 'an action,' and does not appear to authorize dismissal . . . as to one or more defendants without dismissal as to all defendants."<sup>602</sup> Consequently, it was held that the only proper method to be employed by a plaintiff who wishes to dismiss an action against one of many defendants without dismissing all defendants was by motion and leave of court pursuant to rule 1.250.<sup>603</sup> In the case before it, the court viewed this condition as having been met by the trial court's order allowing the "amended notice of dismissal." It may well be argued that this ruling allows parties defendant to attack a plaintiff's ability to dismiss another party defendant, when such a dismissal would be prejudicial to that nondismissed party (if time is needed, for instance, to move for leave of court to file a cross claim after the time under the appropriate rule has run).

The greatest number of decisions handed down over the last two years which involved rule 1.540(b) have dealt with setting aside verdicts due to "mistake, inadvertance, surprise or excusable neglect."<sup>604</sup> Three of the cases reported which allowed a judgment to be set aside involved "notice" insufficiency. In *Rogers v. First National Bank*,<sup>605</sup> the Supreme Court of Florida ordered that a judgment be set aside after the trial and appellate courts had refused to do so. There, a plaintiff had been represented by an attorney who had filed a faulty complaint and had been given, by order of court (and later by stipulation), three weeks to amend. During this period, the plaintiff's law firm dissolved, and the case was assigned to an associate of a former partner who later discovered that a motion to vacate the complaint had been filed and approved by the court, although no notice had been served on the attorney. After a spate of procedural motions and rulings, the trial court refused to set aside the judgment with the approval of the Fourth District. In reversing, the supreme court focused on the lack of notice.

When viewed in its totality, the series of events that transpired below call for a liberal application of Rule 1.540(b), especially since it appears that the rules for notice were not complied with. While our procedural rules provide for an orderly and expeditious administration of justice, we must take care to administer them in a manner conducive to the ends of justice.<sup>606</sup>

A similar result was reached by the District Court of Appeal, First

602. *Cooper v. Carroll*, 239 So.2d 511, 513 (Fla. 3d Dist. 1970).

603. *Id.* See *Scott v. Permacrete, Inc.*, 124 So.2d 887, 889 (Fla. 1st Dist. 1960), cited in *Cooper v. Carroll*, 239 So.2d 511, 513 (Fla. 3d Dist. 1970), where it was stated:

The proper method of dropping parties defendant from a suit is to move for and procure an order of court dismissing the complaint as to the designated defendant or defendants . . . .

604. FLA. R. CIV. P. 1.540(b)(1).

605. 232 So.2d 377 (Fla. 1970), *rev'g* 223 So.2d 365 (Fla. 4th Dist. 1969).

606. *Id.* at 378.



District, in *Woldarsky v. Woldarsky*,<sup>607</sup> where a party, who had not received a copy of a judgment, moved to have a final decree set aside and reentered so that he could take a timely appeal. Once the judgment had been reentered, the successful movant presented the court with a timely-filed motion for a new trial. The trial court then vacated the reentered judgment and ruled that it had been without jurisdiction to enter same in the first place. An appeal was taken; the First District reversed: "It is our view that under the cited rule [1.540(b)], a trial court is vested with discretion to grant relief to a party desiring to seek review of a final judgment . . . , the rendition of which the party was without notice or knowledge."<sup>608</sup> The court, in analogizing Florida's rule to rule 60(b) of the Federal Rules of Civil Procedure, made it clear, though, that the primary factor in its decision was the lack of notice.<sup>609</sup>

Both *Rogers* and *Woldarsky* emphasized by implication that their holdings were not based on attorney neglect, but that distinction was not emphatically underscored in either case. However, the District Court of Appeal, Third District, drove the point home concisely in a 1969 decision.<sup>610</sup> In that case, the appellant had turned process over to his insurance carrier under the terms of the policy. The insurer did not defend, and default and default judgment were entered. When presented with a motion by a defendant based upon good faith reliance upon the insurer providing a defense and no notice of the trial on damages, the trial judge set aside the default and the final judgment. On appeal, the Third District reversed the order setting aside the default, affirmed the order setting aside the final judgment, and ordered that a trial on damages be held. The court explained: "[M]isplaced reliance upon an insurance company for . . . timely defense is not excusable neglect by a defendant within the meaning of Rule 1.540(b) . . . , [b]ut a different situation exists as to the setting aside of the final judgment . . ."<sup>611</sup> (since there had been no notice of the trial on damages as required by the rules).

It is also clear that judgments are not to be set aside lightly because of artfully drawn affidavits. "[A] petition containing only a naked conclusion that there has been a 'misunderstanding,' mistake, inadvertance, or excusable neglect which is totally unsupported by evidence or proof of facts is insufficient as a basis for the court to relieve a party from a final judgment . . ."<sup>612</sup>

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607. 243 So.2d 629 (Fla. 1st Dist. 1971).

608. *Id.* at 630.

609. Care should be taken to note that our approval of vacating and setting aside final judgments under Rule 1.540(b) on the grounds of mistake, inadvertance or excusable neglect, in the context of this case, is restricted to those instances wherein the party seeking to review a final judgment or order had no notice or knowledge of its rendition.

*Id.*

610. *Lawn v. Wasserman*, 226 So.2d 261 (Fla. 3d Dist. 1969), *rev'd on other grounds*, 248 So.2d 548 (Fla. 3d Dist. 1971).

611. *Id.* at 263. For an identical holding, see *Osceola Farms Co. v. Sanchez*, 238 So.2d 477 (Fla. 4th Dist. 1970).

612. *In re Estate of Ashton*, 245 So.2d 674, 676 (Fla. 4th Dist. 1971). In *Ashton*, the

According to rule 1.540(b)(2), a judgment may be set aside when the court is presented with "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing . . . ." However, it is proper for a court to deny a motion to set aside a judgment where an affidavit fails to state that evidence was not available at the start of the trial regardless of quantity or detail in which new evidence is presented.<sup>613</sup>

A *void* judgment may be set aside at any reasonable time; the one year limitation does not control.<sup>614</sup> However, this rule does not apply to *voidable* judgments. For instance, in *Craven v. J.M. Fields, Inc.*,<sup>615</sup> process was served upon the manager of defendant's store. Later, when the defendant did not answer or defend, a default was entered, trial had on the unliquidated damages claim, and final judgment entered. When the judgment was executed upon more than one year later, defendant moved to vacate the judgment on the grounds that the service was void because the return had not stated that process was served on the defendant's manager because of the absence of corporate officers as set forth in Florida Statutes chapter 48 (1967). An amended return was filed, but the court held this to be insufficient and vacated the default and default judgment. The District Court of Appeal, Fourth District, reversed on the grounds that the judgment was not void, but merely voidable since the defendant did actually have notice of the action, even though the return was irregular.<sup>616</sup>

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court had entered a final order construing a will and determining that a power of appointment had been exercised. Sixty-seven days later, two beneficiary-trustees filed an affidavit stating that "through misunderstanding" they had not secured counsel to represent their individual rights under the will. They asked that the final order be set aside. Treating the motion as one under rule 1.540(b), the trial judge did so. The appellate court reversed on the basis that only conclusions were stated in the affidavit, not any facts or circumstances which might give rise to a rule 1.540(b) order setting aside a judgment. "Consequently, that was a failure of pleading and proof which stood fatally in the way of the trial court to make a decision that remedial mistake or neglect existed with reference to the rule." *Id.*

613. *Rushing v. Chappell*, 247 So.2d 749 (Fla. 1st Dist. 1971).

614. FLA. R. Civ. P. 1.540(b)(4). *See also* *Osceola Farms v. Sanchez*, 238 So.2d 477 (Fla. 4th Dist. 1970).

615. 226 So.2d 407 (Fla. 4th Dist. 1969).

616. *See id.* at 410.